34/pt. 1-299/990

code of federal regulations

Education

34

PARTS 1 TO 299
Revised as of July 1, 1990

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PARTS 1 to 299

Revised as of July 1, 1990

CONTAINING
A CODIFICATION OF DOCUMENTS
OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JULY 1, 1990

With Ancillaries

Published by
the Office of the Federal Register
National Archives and Records
Administration

as a Special Edition of
the Federal Register

1985

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1990

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

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Cite this Code: **CFR**

To cite the regulations in this volume use title, part and section number. Thus, **34 CFR 3.1** *refers to title 34, part 3, section 1.*

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

ISSUE DATES

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16	as of January 1
Title 17 through Title 27	as of April 1
Title 28 through Title 41	as of July 1
Title 42 through Title 50	as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

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The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule.

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Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cut-off date for the Code a note has been inserted to reflect the future effective date. In those instances where a regulation published in the Federal Register states a date certain for expiration, an appropriate note will be inserted following the text.

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The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to display an OMB control number with their information collection request. Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

OBSOLETE PROVISIONS

Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 1973, consult either the List of CFR Sections Affected, 1949-1963, or 1964-1972, published in three separate volumes. For the period beginning January 1, 1973, a "List of CFR Sections Affected" is published at the end of each CFR volume.

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What is incorporation by reference? Incorporation by reference was established by statute and allows Federal agencies to meet the requirement to publish regulations in the Federal Register by referring to materials already published elsewhere. For an incorporation to be valid, the Director of the Federal Register must approve it. The legal effect of incorporation by reference is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. 552(a)). This material, like any other properly issued regulation, has the force of law.

What is a proper incorporation by reference? The Director of the Federal Register will approve an incorporation by reference only when the requirements of 1 CFR Part 51 are met. Some of the elements on which approval is based are:

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(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

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Properly approved incorporations by reference in this volume are listed in the Finding Aids at the end of this volume.

What if the material incorporated by reference cannot be found? If you have any problem locating or obtaining a copy of material listed in the Finding Aids of this volume as an approved incorporation by reference, please contact the agency that issued the regulation containing that incorporation. If, after contacting the agency, you find the material is not available, please notify the Director of the Federal Register, National Archives and Records Administration, Washington DC 20408, or call (202) 523-4534.

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A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR INDEX AND FINDING AIDS. This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I), and Acts Requiring Publication in the Federal Register (Table

III). A list of CFR Titles, Chapters, and Parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of "Title 3—The President" is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the "Contents" entries in the daily Federal Register.

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For a summary, legal interpretation, or other explanation of any regulation in this volume, contact the issuing agency. Inquiries concerning editing procedures and reference assistance with respect to the Code of Federal Regulations may be addressed to the Director, Office of the Federal Register, National Archives and Records Administration, Washington, D.C. 20408 (telephone 202-523-3517). Sales are handled exclusively by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 (telephone 202-783-3238).

Martha L. Girard,
Director,
Office of the Federal Register.

July 2, 1990.

THIS TITLE

Title 34—EDUCATION is presently composed of three volumes (Parts 1 to 299, Parts 300 to 399, and Part 400 to End). The contents of these volumes represent all regulations codified under this title of the CFR as of July 1, 1990.

A Redesignation Table appears in the Finding Aids section of each volume.

For this volume Jim Wickliffe was Chief Editor. The Code of Federal Regulations publication program is under the direction of Richard L. Claypoole, assisted by Alomha S. Morris.

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Title 34—Education

(This book contains Parts 1 to 299)

Editorial Note: Title 34—Education was established at 45 FR 30803, May 9, 1980, effective May 4, 1980. Nomenclature changes affecting Title 34 appear at 45 FR 86296-86301, Dec. 30, 1980.

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PART 3—OFFICIAL SEAL

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3.4 Use of the seal.

AUTHORITY: 20 U.S.C. 3472 and 3485, unless otherwise noted.

SOURCE: 45 FR 86491, Dec. 31, 1980, unless otherwise noted.

§ 3.1 Definitions.

For the purposes of this part:

(a) "ED" means all organizational units of the Department of Education.

(b) "Embossing Seal" means a display of the form and content of the Official Seal made on a die so that the Seal can be embossed on paper or other media.

(c) "Official Seal" means the original(s) of the Seal showing the exact form, content, and colors.

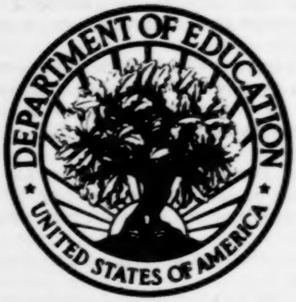
(d) "Replica" means a copy of the Official Seal displaying the identical form, content, and colors.

(e) "Reproduction" means a copy of the Official Seal displaying the form and content, reproduced in only one color.

(f) "Secretary" means the Secretary of Education.

§ 3.2 Description.

The Official Seal of the Department of Education is described as follows: Standing upon a mound, an oak tree with black trunk and limbs and green foliage in front of a gold rising sun, issuing gold rays on a light blue disc, enclosed by a dark blue border with gold edges bearing the inscription "DEPARTMENT OF EDUCATION" above a star at either side of the words "UNITED STATES OF AMERICA" in smaller letters in the base; letters and stars in white. The Offical Seal of the Department is modified when used in reproductions in black and white and when embossed. As so modified, it appears below.



§ 3.3 Authority to affix seal.

The Secretary and the Secretary's designees are authorized to affix the Official Seal, replicas, reproductions, and embossing seals to appropriate documents, certifications, and other material for all purposes as authorized by this section.

(Authority: 20 U.S.C. 3474)

§ 3.4 Use of the seal.

(a) Use by any person or organization outside of the Department may be made only with the Department's prior written approval.

(b) Requests by any person or organization outside of the Department for permission to use the Seal must be made in writing to Deputy Under Secretary for Planning, Budget, and Evaluation, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, D.C. 20202, and must specify, in detail, the exact use to be made. Any permission granted applies only to the specific use for which it was granted and is not to be construed as permission for any other use.

(c) Replicas may be used only:

(1) For display in or adjacent to ED facilities, in Departmental auditoriums, presentation rooms, hearing rooms, lobbies, and public document rooms;

(2) In offices of senior officials;

(3) For official awards, certificates, medals, and plaques;

(4) For motion picture film, video tape and other audiovisual media prepared by or for ED and attributed thereto;

(5) On official publications which represent the achievements or mission of ED;

(6) In non-ED facilities in connection with events and displays sponsored by ED, and public appearances of the Secretary or other senior ED officials; and

(7) For other purposes as determined by the Director of the Office of Administrative Resources Management;

(d) Reproductions may be used only—

(1) On ED letterhead stationery;

(2) On official ED identification cards, security, and other approved credentials;

(3) On business cards for ED employees;

(4) On official ED signs;

(5) On official publications or graphics issued by and attributed to ED, or joint statements of ED with one or more other Federal agencies, State or local governments, or foreign governments;

(6) On official awards, certificates, and medals;

(7) On motion picture film, video tape, and other audiovisual media prepard by or for ED and attributed thereto; and

(8) For other purposes as determined by the Director of the Office of Administrative Resources Management.

(e) Embossing seals may be used only—

(1) On ED legal documents, including interagency or intergovernmental agreements, agreements with State or local governments, foreign patent applications, certification(s) of true copies, and similar documents;

(2) On official awards and certificates; and

(3) For other purposes as determined by the General Counsel or Deputy Under Secretary for Management.

(f) Falsely making, forging, counterfeiting, mutilating, or altering the Official Seal, replicas, reproductions, or embossing seals, or knowingly using or possessing with fraudulent intent and altered official seal, replica, reproduction or embossing seal is punishable under 18 U.S.C. 506.

(g) Any person using the Official Seal, replicas, reproductions, or embossing seals in a manner inconsistent with the provisions of this part is subject to the provisions of 18 U.S.C. 1017, which states penalties for the wrongful use of an Official Seal, and to other provisions of law as applicable.

[45 FR 86491, Dec. 31, 1980, as amended at 53 FR 4620, Feb. 17, 1988]

PART 4—SERVICE OF PROCESS

§ 4.1 Service of process required to be served on or delivered to Secretary.

Summons, complaints, subpoenas, and other process which are required to be served on or delivered to the Secretary of Education shall be delivered to the General Counsel or a Deputy General Counsel, by mail at 400 Maryland Avenue SW., Washington, D.C. 20202 or by personal service at that address. The persons above designated are authorized to accept service of such process.

(Authority: 5 U.S.C. 301)

[47 FR 16780, Apr. 20, 1982]

PART 5—AVAILABILITY OF INFORMATION TO THE PUBLIC PURSUANT TO PUB. L. 90-23

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APPENDIX TO PART 5

AUTHORITY: 5 U.S.C. 552.

SOURCE: 45 FR 30803, May 9, 1980, unless otherwise noted.

Subpart A—Definitions

§ 5.1 Act.

As used in this part, "Act" means section 552 of Title 5, United States Code, as amended by Pub. L. 90–23, codifying the Act of July 4, 1966, sometimes referred to as the "Freedom of Information Act".

§ 5.2 Department.

As used in this part, "Department" means the Department of Education.

§ 5.5 Records.

As used in this part:

(a) "Record" includes books, brochures, punch cards, magnetic tapes, paper tapes, sound recordings, maps, pamphlets, photographs, slides, motion pictures, or other documentary materials, regardless of physical form or characteristics, made or received by the Department pursuant to Federal law or in connection with the transaction of public business and preserved by the Department as evidence of the organization, functions, policies, decisions, procedures, operations, programs, or other activities.

(b) "Record" does not include: Objects or articles such as tangible exhibits, models, equipment, or processing materials; or formulae, designs, drawings, or other items of valuable property; books, magazines, pamphlets, or other reference material in formally organized and officially designated libraries of the Department, which are available under the rules of the particular library concerned.

§ 5.6 Statutory definitions.

The definitions in the Act and the Office of Management and Budget's "Uniform FOIA Fee Schedule and Guidelines," 52 FR 10012 (March 27, 1987), apply to this part.

[52 FR 32525, Aug. 27, 1987]

Subpart B—What Records Are Available

§ 5.11 Purpose and scope.

This part constitutes the regulation of the Department respecting the availability to the public, pursuant to the Act, of records of the Department. It informs the public what records are generally available.

§ 5.12 General policy.

The Department's policy is one of the fullest responsible disclosure limited only by the obligations of confidentiality and the administrative necessities recognized by the Act. Unless otherwise exempted from disclosure pursuant to law, records of the Department shall be available for inspection and copying in accordance with this part.

§ 5.13 Records available.

(a) *Publication in the Federal Register*. The following shall be published in the FEDERAL REGISTER:

(1) Descriptions of the Department's central and field organization and the established places at which, the officers from whom, and the methods

whereby, the public may secure information, make submittals or requests, or obtain decisions;

(2) Statements of the general course and method by which the Department's functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(3) Rules of procedures, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(4) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Department;

(5) Every amendment, revision, or repeal of the foregoing.

(b) *Agency opinions and orders.* The Department shall, in accordance with this part and applicable regulations, make available for public inspection and copying:

(1) All final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases (initial decisions and reconsiderations thereof in matters that are not the result of administrative proceedings such as hearings or formal appeals are not "opinions and orders in the adjudication of cases");

(2) Those statements of policy and interpretations which have been adopted by the agency and are not published in the FEDERAL REGISTER;

(3) Administrative staff manuals and instructions to staff that affect any member of the public;

unless such materials are promptly published and copies offered for sale.

The Department shall maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter which is issued, adopted, or promulgated after July 4, 1967, and which is required by this paragraph (b) to be published or made available.

(c) *Availability of records on request.* In addition to the records made available pursuant to paragraphs (a) and (b) of this section, the Department shall, upon request for identifiable records made in accordance with this part, make such records available to any person, unless it is determined that such records must be withheld from disclosure and are exempt under subsection (b) of the Act and Subpart F of this part.

§ 5.14 Published documents.

Published records of the Department, whether or not available for purchase, shall be made available for examination.

§ 5.15 Creation of records.

Records are not required to be created by compiling selected items from the files, and records are not required to be created to provide the requester with such data as ratios, proportions, percentages, per capitas, frequency distributions, trends, correlations, and comparisons. If such data have been compiled and are available in the form of a record, the record shall be made available as provided in this part.

§ 5.16 Deletion of identifying details.

Whenever any final opinion, order, or other materials required to be made available pursuant to subsection (a)(2) of the Act relates to a private party or parties and the release of the name or names or other identifying details will constitute a clearly unwarranted invasion of personal privacy, the record shall be published or made available with such identifying details left blank, or shall be published or made available with obviously fictitious substitutes and with a notification such as the following as a preamble:

> Names of parties and certain other identifying details have been removed [and fictitious names substituted] in order to prevent a clearly unwarranted invasion of the personal privacy of the individuals involved.

§ 5.17 Records in record centers.

When a request is made for identifiable records of the Department which have been stored in the National Archives or other record centers of the General Services Administration, but would otherwise be available under this Act, such records shall be requested by the Department for the requester.

§ 5.18 Destroyed records.

Records of specified form or character are destroyed after the lapse of time specified in the Records Disposal Act of 1943 (44 U.S.C. 366-380), the Federal Property Management Regulations (41 CFR Parts 101-111), and the Records Control Schedules.

§ 5.19 Records of other departments and agencies.

Requests for records which originated in or concern matters which originated in another Department or Government agency may be forwarded to the Department or agency primarily concerned and the requester so notified.

Subpart C—Freedom of Information Officer

§ 5.32 Freedom of information officer.

The Freedom of Information Officer shall be responsible for determining whether records of the Department must be withheld from disclosure and shall have authority to deny requests for records of the Department.

Subpart D—Procedures for Requesting Access to Records

§ 5.51 Procedure.

(a) A request for any information or record may be made at any appropriate office of the Department.

(b) If a request is made at any office of the Department and the information or record is not located where the request is made, the requester shall be referred to the proper office, or if the request is put in writing it may be forwarded to the proper office.

(c) A request should reasonably identify the requested record by brief description. Requesters who have detailed information which would assist in identifying the records requested are urged to provide such information in order to expedite the handling of the request. Envelopes in which written requests are submitted should be clearly identified as a Freedom of Information request.

(d) Determination of whether records will be released or withheld will be made within 10 working days from date of receipt in the office having custody of the records This time may be extended by written notice for no longer than an additional 10 working days, only in unusual circumstances. Unusual circumstances mean:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

If such extension is made, the requester will be notified in writing with an explanation of why the extension was necessary and the date on which a determination will be made.

§ 5.52 Copies of records.

Copies of available records shall be produced as promptly as possible upon receipt of the fee therefor. Copying service shall be limited to not more than two copies of any single page, except that additional copies may be made where administrative considerations permit. Records which are published or available for sale need not be copied.

§ 5.53 Denial of requests for records.

Written requests for inspection or copying of records shall be denied only by the Freedom of Information Officer. Denials of requests shall be in writing and shall contain the reasons for the denial and provide the requester with appropriate information on how to exercise the right of appeal under Subpart G of this part. Such notification shall also set forth the names and titles or positions of each person responsible for the denial of such request if such person or persons is other than the Freedom of Information Officer.

Subpart E—Fees and Charges

SOURCE: 52 FR 32525, Aug. 27, 1987, unless otherwise noted.

§ 5.60 Schedule of fees.

(a) Fees and charges are charged under this part as follows:

(1) *Search for records*—(i) *General.* Full search fees are charged for records requested by commercial use requesters. For records requested by representatives of the news media or educational or noncommercial scientific institutions whose purpose is scholarly or scientific research, no search fee is charged if the records requested are not for commercial use. For other requesters, if the records requested are not for commercial use, the first two hours of search time are provided without charge, except as limited in paragraph (a)(1)(iii) of this section. Search fees are recorded and assessed to the nearest quarter hour.

(ii) *Manual search.* The charge for a manual search is calculated by determining the search time to the nearest quarter hour and multiplying that figure by the sum of the basic rate of pay per hour of the employee conducting the search plus 16 percent of that rate.

(iii) *Computer search.* The charge for a computer search is calculated by determining the search time to the nearest quarter hour and multiplying that figure by the sum of the basic rate of pay per hour of the computer operator plus 16% of that rate plus $287 per hour for computer operation. Two hours of search time on a computer search is deemed to have been spent if the cost of the search equals the equivalent of two hours of the computer operator's basic rate of pay per hour plus 16 percent of that rate.

(2) *Review of records.* Review fees are charged only for commercial use requests and only for the initial review. The review rate is calculated by determining the review time to the nearest quarter hour and multiplying that figure by the sum of the basic rate of pay per hour of the employee conducting the review plus 16% of that rate. If records requested under this part are stored elsewhere than the headquarters of the Department at Washington, DC., the mailing and handling costs of returning those records to the headquarters for review is added to the review costs.

(3) *Duplication of records.* No duplication fee is charged for the first 100 pages, except for commercial use requests. Duplication charges for paper copy reproduction of documents on photocopy machines is $0.10 per page.

(4) *Certification of records.* The charge for certifying records is $5 per record certified.

(5) *Other.* If no specific fee has been established for a service, or the request for a service does not fall under one of the categories in paragraphs (a)(1)-(4) of this section due to the amount or type of service, the Secretary is authorized to establish an appropriate fee, based on direct costs on a case-by-case basis as provided in the FOIA.

(b) If the Secretary awards a contract for a search or duplication of records for a FOI request, the fees charged are the actual costs under the contract.

(c) Fees are not charged if the total amount of the fee is less than $5. If the total amount of the fee is $5, or more, applicable search and review costs are charged even if no records are located or disclosed. The Secretary does not refund fees paid for services actually rendered.

(d) If the FOI Officer reasonably believes that a requester or group of requesters acting in concert is attempting to break down a request into multiple requests for the purpose of avoiding fee assessment, those requests and fees are aggregated and charged accordingly.

§ 5.61 Notification of estimated fees.

If the estimated fees under this section total more than $25, or more than the maximum amount specified in the request if that amount exceeds $25, the requester is:

(a) Notified promptly of the amount of the estimated fee or that portion of the fee as can readily be estimated; and

(b) Offered the opportunity to reformulate the request.

§ 5.62 Advance payment of fees.

(a) If the estimated fee for processing a request exceeds $250, the FOI Officer:

(1) Notifies the requester of the anticipated cost and obtains satisfactory assurance of full payment if the requester has a history of prompt payment of FOIA fees; or

(2) Requires an advance payment if the requester has no history of payment.

(b) If a requester has previously failed to pay a fee in a timely fashion, the FOI Officer does not process any subsequent request until the requester pays the arrears in full, including interest, and makes an advance payment of the estimated fee for the new request.

(c) Requests under this section are not deemed to have been received for purposes of § 5.51(d) until the Department receives the satisfactory assurance or advance payment.

§ 5.63 Payment of fees and interest.

(a) If a requester does not pay a fee under this subpart within 30 days after the date the billing was sent, interest is assessed at the rate prescribed under 31 U.S.C. 3717. The Secretary may use the procedures authorized under the Debt Collection Act of 1982 to collect fees due under this subpart, including disclosure to consumer reporting or collection agencies.

(b) Fee payments must be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Fee payments must be made payable to the U.S. Department of Education and mailed to the FOI Officer, Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202. A receipt for fees paid is given upon request.

§ 5.64 Waiver or reduction of fees.

(a) The Secretary may, in accordance with the FOIA, waive or reduce all or part of any fee provided for in this section if the Secretary determines that it is:

(1) In the public interest because furnishing the information can be considered as primarily benefiting the general public and is likely to contribute significantly to public understanding of the operations or activities of the government; and

(2) Is not primarily in the commercial interest of the requester.

(b) In making the determination to waive or reduce a fee under paragraph (a) of this section, the Secretary considers the following factors:

(1) Whether the subject of the requested records concerns the operations or activities of the government.

(2) Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

(3) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so, whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

Subpart F—Availability of Specific Records

§ 5.70 Policy.

This subpart specifies the types of records which the Department shall, in keeping with its policy of fullest possible disclosure, make available for inspection and copying. For clarity and purposes of guidance, there are also set forth below the kinds or portions of records which generally will not be released, except as may be determined under § 5.74. The appendix to this part contains some examples of the kinds of materials which, in accordance with § 5.72, will generally be released and other materials which, in accordance with § 5.73, are not normally available. In the event that any record contains both information which is disclosable and that which is not disclosable under this regulation, the nondisclosable information will be deleted and the balance of the record disclosed.

§ 5.71 Protection of personal privacy and proprietary information.

As set forth with more particularity below, certain types of information in whatever record or document contained shall not be disclosed where disclosure would be inconsistent with individual rights of personal privacy or would violate obligations of confidentiality.

(a) No disclosure will be made of information of a personal and private nature, such as information in personnel and medical files, in welfare and social security records and any other information of a private and personal nature.

(b) Information having a commercial or financial value and in which the person providing the information has a proprietary interest will not be disclosed if it is in fact confidential. In determining whether such information is in fact confidential, consideration may be given to such factors as (1) the general custom or usage in the occupation or business to which the information relates that it be held confidential, (2) the number and situation of the individuals who have access to such information, (3) the type and degree of risk of financial injury to be expected if disclosure occurs, and (4) the length of time such information should be regarded as retaining the characteristics noted above.

(c) Information obtained by the Department from any individual or organization, who furnishes it in reliance upon a provision for confidentiality authorized by applicable statute or regulation, will not be disclosed. This subpart does not itself authorize the giving of any pledge of confidentiality by any officer or employee of the Department.

This section does not preclude use of nondiscloseable records or information from such records for authorized program purposes, including law enforcement purposes and litigation. Release of information of the nature described in this section to the individual or the organization to whom the information pertains or to an authorized representative of either will not be deemed a disclosure within the meaning of this part.

§ 5.72 Records available.

The following records of the Department shall, subject to the exceptions set forth in §§ 5.71 and 5.73, be available upon request for inspection and copying.

(a) *Correspondence.* Correspondence, relating to or resulting from the conduct of the official business of the Department, between the Department and individuals or organizations which are not agencies within the meaning of 5 U.S.C. 551(1) and 552(e).

(b) *Records pertaining to grants.* (1) Portions of funded initial research grant applications and portions of continuation, renewal or supplemental grant applications, whether funded or not, including interim progress reports and other supporting documents submitted by applicants, which are not otherwise exempted from disclosure by this subpart.

(2) Grant award documents.

(3) All State plans, amendments, and supplements thereto, including applications for the waiver of any provision thereof whether acted upon by the Department or not.

(c) *Contracts.* (1) Contract instruments.

(2) Portions of offers reflecting final prices submitted in negotiated procurements.

(d) *Reports on grantee, contractor, or provider performance.* Final reports of audits, surveys, reviews, or evaluations by, for, or on behalf of the Department, of performance by any grantee, contractor, or provider under any departmentally financed or supported program or activity, which reports have been transmitted to the grantee, contractor, or provider.

(e) *Research, development, and demonstration project records.* The reports of a grantee or a contractor of the performance under any research, development, or demonstration project, records, other than reports, produced in such projects, such as films, computer software, other copyrightable materials and reports of inventions, will be available, except that considerations relating to obtaining copyright and patent protection may require delay in disclosure for such period as necessary to accomplish such protection. Disclosure of records which are copyrightable or which reflect patentable inventions shall not confer upon the requester any license under any copyright or patent without regard to the holder or owner thereof.

§ 5.73 Records not available.

The following types of records or information contained in any record, in addition to those prohibited by law from disclosure, are not available for inspection or copying, any provision of § 5.72 notwithstanding:

(a) *Intra-agency and inter-agency communications.* Communications within the Department other than those described in § 5.72(d) or between the Department or any other agency within the meaning of 5 U.S.C. 551(1) and 552(e), to the extent they reflect the views or judgment of the writer or of other individuals. If disclosure of any factual portion of the communication would indicate the views or judgment being withheld from disclosure, then such factual portions will also be withheld.

(b) *Investigatory files.* Investigatory files compiled for law enforcement purposes to the extent that production of such records would (1) interfere with enforcement proceedings, (2) deprive a person of a right to a fair trial or an impartial adjudication, (3) constitute an unwarranted invasion of personal privacy, (4) disclose the identity of a confidential source, and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (5) disclose investigative techniques and procedures or (6) endanger the life or physical safety of law enforcement personnel. For the purpose of this section "enforcement action" means any authorized action intended to abate, prevent, counteract, deter, or terminate violations of law and includes action involving possible civil, criminal, or administrative sanctions whether such sanctions involve adversary proceedings or other procedures, such as termination of benefits, protective measures, etc.

§ 5.74 Further disclosure.

(a) The Secretary may in particular instances, except where prohibited by law, disclose documents or portions of documents described in § 5.73 if he determines that disclosure is in the public interest and is consistent with obligations of confidentiality and administrative necessity.

(b) In making such a determination, consideration may be given to the Department's responsibilities under law for dissemination to the public of information relating to education.

(c) When such determination has been made, the particular document or portion of document to which it relates shall thereafter be available upon request for inspection and copying: *Provided however,* That use of nondiscloseable records or information from such records for authorized program purposes, including law enforcement purposes and litigation is not a disclosure within the meaning of this section.

Subpart G—Administrative Review

§ 5.80 Review of denial of a record.

This subpart provides for the review of a denial, pursuant to § 5.53, of a written request for inspection or copying of a record.

§ 5.81 Time for initiation of request for review.

A person whose request has been denied may initiate a review by filing a request for review within (a) 30 days of receipt of the determination to deny or (b) within 30 days of receipt of records which are in partial response to his request if a portion of a request is granted and a portion denied, whatever is later.

§ 5.82 By whom review is made.

(a) Requests for review of denials should be addressed to the Secretary.

§ 5.83 Contents of request for review.

The request for review shall include a copy of the written request and the denial.

§ 5.84 Consideration on review.

Review shall be considered on the basis of the written record including any written argument submitted by the requester.

§ 5.85 Decisions on review.

(a) Decisions on review shall be in writing within 20 working days from receipt of the request for review. Extension of the time limit may be granted to the extent that the maximum 10-day limit on extensions has not been exhausted on the initial determination. Such extension may only be granted for the reasons enumerated in § 5.51(d).

(b) The decision, which constitutes final action of the Department, if adverse to the requester shall be in writing, stating the reasons for the decision, and advising the requester of the right to judicial review of such decision.

(c) Failure to comply with time limits set forth in § 5.51 or in this paragraph constitutes an exhaustion of the requester's administrative remedies.

APPENDIX TO PART 5

[The following are some examples of specific records (or specific information relating to personnel, programs, or activities of this Department) listed according to whether or not they are available upon request for inspection and copying]

Generally available	Generally not available
GRANTS	
Funded initial grant applications, subject to provisions of § 5.71. Reports of grantee. Final report of any review or evaluation of grantee performance conducted or caused to be conducted by the Department. Applications for continuation, renewal, or supplemental grants, subject to provisions of § 5.71. State plan material.	Research protocol, design, processing, and other technical information to the extent proprietary or of a confidential nature submitted with initial applications not yet funded, or where disclosure would adversely affect patent or other valuable rights. Confidential financial information of grantee. Site visit reports. Initial research or research training grant application on which award is not made.
CONTRACTS	
Name of contractor, subject matter, date, and amount of contract. Contract performance review report Deficiency report Final report	Trade secrets. Confidential pricing data contained in contract proposal if in the Department's judgment it is properly so designated by the offeror. Proprietary technical data contained in a contract proposal if in the Department's judgment it is properly so designated by offeror. Confidential financial information of contractor Draft of proposed final report submitted for comment prior to acceptance. Research protocol, design, processing, and other technical information to the extent proprietary or of a confidential nature, including proprietary contents of unsolicited proposals. Proposals on which no award is made.
ADVISORY COMMITTEES	
Name of committee Final report Minutes or transcripts of meetings open to the public and not involved with matters exempt from mandatory disclosure under Freedom of Information Act.	Minutes or transcripts of committee meetings or portions thereof which are involved with matters exempt from mandatory disclosure under Freedom of Information Act.
PERSONNEL INFORMATION	
Name of employee, title of position, and location of regular duty station. Grade, position description, and salary of public employees.	Home addresses of employees.

APPENDIX TO PART 5—Continued

[The following are some examples of specific records (or specific information relating to personnel, programs, or activities of this Department) listed according to whether or not they are available upon request for inspection and copying]

Generally available	Generally not available
AFFIRMATIVE ACTION PLAN FILED PURSUANT TO EXECUTIVE ORDER 11246	
Approved action plan, including analysis, proposed remedial or affirmative steps to be taken with goals and timetables, policies on recruitment, hiring, and promotion, and description of grievance procedures.	
MISCELLANEOUS	
	Names of individual beneficiaries of departmental programs or a list of the benefits they receive if release would be an unwarranted invasion of privacy. Office for Civil Rights investigatory files in open cases.

PART 5b—PRIVACY ACT REGULATIONS

Sec.

5b.1 Definitions.
5b.2 Purpose and scope.
5b.3 Policy.
5b.4 Maintenance of records.
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5b.7 Procedures for correction or amendment of records.
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5b.9 Disclosure of records.
5b.10 Parents and guardians.
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5b.12 Contractors.
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APPENDIX A TO PART 5b—EMPLOYEE STANDARDS OF CONDUCT
APPENDIX B TO PART 5b—ROUTINE USES APPLICABLE TO MORE THAN ONE SYSTEM OF RECORDS MAINTAINED BY ED

AUTHORITY: 5 U.S.C. 301, 5 U.S.C. 552a.

SOURCE: 45 FR 30808, May 9, 1980, unless otherwise noted.

§ 5b.1 Definitions.

As used in this part:

(a) "Access" means availability of a record to a subject individual.

(b) "Agency" means the Department of Education.

(c) "Department" means the Department of Education.

(d) "Disclosure" means the availability or release of a record to anyone other than the subject individual.

(e) "Individual" means a living person who is a citizen of the United States or an alien lawfully admitted for permanent residence. It does not include persons such as sole proprietorships, partnerships, or corporations. A business firm which is identified by the name of one or more persons is not an individual within the meaning of this part.

(f) "Maintain" means to maintain, collect, use, or disseminate when used in connection with the term "record"; and, to have control over or responsibility for a system of records when used in connection with the term "system of records."

(g) "Notification" means communication to an individual whether he is a subject individual.

(h) "Record" means any item, collection, or grouping of information about an individual that is maintained by the Department, including but not limited to the individual's education, financial transactions, medical history, and criminal or employment history and that contains his name, or an identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. When used in this part, record means only a record which is in a system of records.

(i) "Responsible Department official" means that officer who is listed in a notice of a system of records as the system manager for a given system of records or another individual listed in the notice of a system of records to whom requests may be made, or the designee of either such officer or individual.

(j) "Routine use" means the disclosure of a record outside the Department, without the consent of the subject individual, for a purpose which is compatible with the purpose for which the record was collected. It includes disclosures required to be made by statute other than the Freedom of Information Act, 5 U.S.C. 552. It does not include disclosures which are permitted to be made without the consent of the subject individual which are not compatible with the purpose for which it was collected such as disclosures to the Bureau of the Census, the General Accounting Office, or to Congress.

(k) "Secretary" means the Secretary of Education.

(l) "Statistical record" means a record maintained for statistical research or reporting purposes only and not maintained to make determinations about a particular subject individual.

(m) "Subject individual" means that individual to whom a record pertains.

(n) "System of records" means any group of records under the control of the Department from which a record is retrieved by personal identifier such as the name of the individual, number, symbol or other unique retriever assigned to the individual. Single records or groups of records which are not retrieved by a personal identifier are not part of a system of records. Papers maintained by individual employees of the Department which are prepared, maintained, or discarded at the discretion of the employee and which are not subject to the Federal Records Act, 44 U.S.C. 2901, are not part of a system of records; *Provided*, That such personal papers are not used by the employee or the Department to determine any rights, benefits, or privileges of individuals.

[45 FR 30808, May 9, 1980; 45 FR 37426, June 3, 1980]

§ 5b.2 Purpose and scope.

(a) This part implements section 3 of the Privacy Act of 1974, 5 U.S.C. 552a (hereinafter referred to as the Act), by establishing agency policies and procedures for the maintenance of records. This part also establishes agency policies and procedures under which a subject individual may be given notification of or access to a record pertaining to him and policies and procedures under which a subject individual may have his record corrected or amended if he believes that his record is not accurate, timely, complete, or relevant or necessary to accomplish a Department function.

(b) All components of the Department are governed by the provisions of this part. Also governed by the provisions of this part are advisory committees and councils within the meaning of the Federal Advisory Committee Act which provide advice to (1) any official or component of the Department or (2) the President and for which the Department has been delegated responsibility for providing services.

(c) Employees of the Department governed by this part include all regular and special government employees of the Department; experts and consultants whose temporary (not in excess of 1 year) or intermittent services have been procured by the Department by contract pursuant to 3109 of title 5, United States Code; volunteers where acceptance of their services are authorized by law; those individuals performing gratuitous services as permitted under conditions prescribed by the Office of Personnel Management; and, participants in work-study or training programs.

(d) This part does not:

(1) Make available to a subject individual records which are not retrieved by that individual's name or other personal identifier.

(2) Make available to the general public records which are retrieved by a subject individual's name or other personal identifier or make available to the general public records which would otherwise not be available to the general public under the Freedom of Information Act, 5 U.S.C. 552, and Part 5 of this title.

(3) Govern the maintenance or disclosure of, notification of or access to, records in the possession of the Department which are subject to regulations of another agency, such as personnel records subject to the regulations of the Office of Personnel Management.

(4) Apply to grantees, including State and local governments or subdivisions thereof, administering federally funded programs.

(5) Make available records compiled by the Department in reasonable anticipation of court litigation or formal administrative proceedings. The availability of such records to the general public or to any subject individual or party to such litigation or proceedings shall be governed by applicable constitutional principles, rules of discovery, and applicable regulations of the Department.

§ 5b.3 Policy.

It is the policy of the Department to protect the privacy of individuals to the fullest extent possible while nonetheless permitting the exchange of records required to fulfill the administrative and program responsibilities of the Department, and responsibilities of the Department for disclosing records which the general public is entitled to have under the Freedom of Information Act, 5 U.S.C. 552, and Part 5 of this title.

§ 5b.4 Maintenance of records.

(a) No record will be maintained by the Department unless:

(1) It is relevant and necessary to accomplish a Department function required to be accomplished by statute or Executive Order;

(2) It is acquired to the greatest extent practicable from the subject individual when maintenance of the record may result in a determination about the subject individual's rights, benefits or privileges under Federal programs;

(3) The individual providing the record is informed of the authority for providing the record (including whether the providing of the record is mandatory or voluntary, the principal purpose for maintaining the record, the routine uses for the record, what effect his refusal to provide the record may have on him), and if the record is not required by statute or Executive Order to be provided by the individual, he agrees to provide the record.

(b) No record will be maintained by the Department which describes how an individual exercises rights guaranteed by the First Amendment unless expressly authorized (1) by statute, or (2) by the subject individual, or (3) unless pertinent to and within the scope of an authorized law enforcement activity.

§ 5b.5 Notification of or access to records.

(a) *Times, places, and manner of requesting notification of or access to a record.* (1) Any individual may request notification of a record. He may at the same time request access to any record pertaining to him. An individual may be accompanied by another individual of his choice when he requests access to a record in person; *Provided,* That he affirmatively authorizes the presence of such other individual during any discussion of a record to which access is requested.

(2) An individual making a request for notification of or access to a record shall address his request to the responsible Department official and shall verify his identity when required in accordance with paragraph (b)(2) of this section. At the time the request is made, the individual shall specify which systems of records he wishes to have searched and the records to which he wishes to have access. He may also request that copies be made of all or any such records. An individual shall also provide the responsible Department official with sufficient particulars to enable such official to distinguish between records on subject individuals with the same name. The necessary particulars are set forth in the notices of systems of records.

(3) An individual who makes a request in person may leave with any responsible Department official a request for notification of or access to a record under the control of another responsible Department official; *Provided,* That the request is addressed in writing to the appropriate responsible Department official.

(b) *Verification of identity*—(1) *When required.* Unless an individual, who is making a request for notification of or access to a record in person, is personally known to the responsible Department official, he shall be required to verify his identity in accordance with paragraph (b)(2) of this section if:

(i) He makes a request for notification of a record and the responsible Department official determines that the mere disclosure of the existence of the record would be a clearly unwarranted invasion of privacy if disclosed to someone other than the subject individual; or,

(ii) He makes a request for access to a record which is not required to be disclosed to the general public under the Freedom of Information Act, 5 U.S.C. 552, and Part 5 of this title.

(2) *Manner of verifying identity.* (i) An individual who makes a request in person shall provide to the responsible Department official at least one piece of tangible identification such as a driver's license, passport, alien or voter registration card, or union card to verify his identity. If an individual does not have identification papers to verify his identity, he shall certify in writing that he is the individual who he claims to be and that he understands that the knowing and willful request for or acquisition of a record pertaining to an individual under false pretenses is a criminal offense under the Act subject to a $5,000 fine.

(ii) Except as provided in paragraph (b)(2)(v) of this section, an individual who does not make a request in person shall submit a notarized request to the responsible Department official to verify his identity or shall certify in his request that he is the individual who he claims to be and that he understands that the knowing and willful request for or acquisition of a record pertaining to an individual under false pretenses is a criminal offense under the Act subject to a $5,000 fine.

(iii) An individual who makes a request on behalf of a minor or legal incompetent as authorized under § 5b.10 of this part shall verify his relationship to the minor or legal incompetent, in addition to verifying his own identity, by providing a copy of the minor's birth certificate, a court order, or other competent evidence of guardianship to the responsible Department official; *except that,* an individual is not required to verify his relationship to the minor or legal incompetent when he is not required to verify his own identity or when evidence of his relationship to the minor or legal incompetent has been previously given to the responsible Department official.

(iv) An individual shall further verify his identity if he is requesting notification of or access to sensitive records. Any further verification shall parallel the record to which notification or access is being sought. Such further verification may include such particulars as the individual's years of attendance at a particular educational institution, rank attained in the uniformed services, date or place of birth, names of parents, or an occupation.

(v) An individual who makes a request by telephone shall verify his identity by providing to the responsible Department official identifying particulars which parallel the record to which notification or access is being sought. If the responsible Department official determines that the particulars provided by telephone are insufficient, the requester will be required to submit the request in writing or in person. Telephone requests will not be accepted where an individual is requesting notification of or access to sensitive records.

(c) *Granting notification of or access to a record.* (1) Subject to the provisions governing exempt systems in § 5b.11 of this part, a responsible Department official, who receives a request for notification of or access to a record and, if required, verification of an individual's identity, will review the request and grant notification or access to a record, if the individual requesting access to the record is the subject individual.

(2) If the responsible Department official determines that there will be a delay in responding to a request because of the number of requests being processed, a breakdown of equipment, shortage of personnel, storage of records in other locations, etc., he will so inform the individual and indicate when notification or access will be granted.

(3) Prior to granting notification of or access to a record, the responsible Department official may at his discretion require an individual making a request in person to reduce his request to writing if the individual has not al-

ready done so at the time the request is made.

§ 5b.7 Procedures for correction or amendment of records.

(a) Any subject individual may request that his record be corrected or amended if he believes that the record is not accurate, timely, complete, or relevant or necessary to accomplish a Department function. A subject individual making a request to amend or correct his record shall address his request to the responsible Department official in writing; *except that*, the request need not be in writing if the subject individual makes his request in person and the responsible Department official corrects or amends the record at that time. The subject individual shall specify in each request:

(1) The system of records from which the record is retrieved;

(2) The particular record which he is seeking to correct or amend;

(3) Whether he is seeking an addition to or a deletion or substitution of the record; and,

(4) His reasons for requesting correction or amendment of the record.

(b) A request for correction or amendment of a record will be acknowledged within 10 working days of its receipt unless the request can be processed and the subject individual informed of the responsible Department official's decision on the request within that 10 day period.

(c) If the responsible Department official agrees that the record is not accurate, timely, or complete based on a preponderance of the evidence, the record will be corrected or amended. The record will be deleted without regard to its accuracy, if the record is not relevant or necessary to accomplish the Department function for which the record was provided or is maintained. In either case, the subject individual will be informed in writing of the correction, amendment, or deletion and, if accounting was made of prior disclosures of the record, all previous recipients of the record will be informed of the corrective action taken.

(d) If the responsible Department official does not agree that the record should be corrected or amended, the subject individual will be informed in writing of the refusal to correct or amend the record. He will also be informed that he may appeal the refusal to correct or amend his record § 5b.8 of this part.

(e) Requests to correct or amend a record governed by the regulation of another government agency, *e.g.*, Office of Personnel Management, Federal Bureau of Investigation, will be forwarded to such government agency for processing and the subject individual will be informed in writing of the referral.

§ 5b.8 Appeals of refusals to correct or amend records.

(a) *Processing the appeal.* (1) A subject individual who disagrees with a refusal to correct or amend his record may appeal the refusal in writing. All appeals shall be made to the Secretary.

(2) An appeal will be completed within 30 working days from its receipt by the appeal authority; *except that*, the appeal authority may for good cause extend this period for an additional 30 days. Should the appeal period be extended, the subject individual appealing the refusal to correct or amend the record will be informed in writing of the extension and the circumstances of the delay. The subject individual's request to amend or correct the record, the responsible Department official's refusal to correct or amend, and any other pertinent material relating to the appeal will be reviewed. No hearing will be held.

(3) If the appeal authority agrees that the record subject to the appeal should be corrected or amended, the record will be amended and the subject individual will be informed in writing of the correction or amendment. Where an accounting was made of prior disclosures of the record, all previous recipients of the record will be informed of the corrective action taken.

(4) If the appeal is denied, the subject individual will be informed in writing:

(i) Of the denial and the reasons for the denial;

(ii) That he has a right to seek judicial review of the denial; and,

(iii) That he may submit to the responsible Department official a concise statement of disagreement to be associated with the disputed record and disclosed whenever the record is disclosed.

(b) *Notation and disclosure of disputed records.* Whenever a subject individual submits a statement of disagreement to the responsible Department official in accordance with paragraph (a)(4)(iii) of this section, the record will be noted to indicate that it is disputed. In any subsequent disclosure, a copy of the subject individual's statement of disagreement, will be disclosed with the record. If the responsible Department official deems it appropriate, a concise statement of the appeal authority's reasons for denying the subject individual's appeal may also be disclosed with the record. While the subject individual will have access to this statement of reasons, such statement will not be subject to correction or amendment. Where an accounting was made of prior disclosures of the record, all previous recipients of the record will be provided a copy of the subject individual's statement of disagreement, as well as the statement, if any, of the appeal authority's reasons for denying the subject individual's appeal.

§ 5b.9 Disclosure of records.

(a) *Consent to disclosure by a subject individual.* (1) Except as provided in paragraph (b) of this section authorizing disclosures of records without consent, no disclosure of a record will be made without the consent of the subject individual. In each case the consent, whether obtained from the subject individual at the request of the Department or whether provided to the Department by the subject individual on his own initiative, shall be in writing. The consent shall specify the individual, organizational unit or class of individuals or organizational units to whom the record may be disclosed, which record may be disclosed and, where applicable, during which time frame the record may be disclosed (*e.g.,* during the school year, while the subject individual is out of the country, whenever the subject individual is receiving specific services). A blanket consent to disclose all of a subject individual's records to unspecified individuals or organizational units will not be honored. The subject individual's identity and, where applicable (*e.g.,* where a subject individual gives consent to disclosure of a record to a specific individual), the identity of the individual to whom the record is to be disclosed shall be verified.

(2) A parent or guardian of any minor is not authorized to give consent to a disclosure of the minor's medical record.

(b) *Disclosures without the consent of the subject individual.* The disclosures listed in this paragraph may be made without the consent of the subject individual. Such disclosures are:

(1) To those officers and employees of the Department who have a need for the record in the performance of their duties. The responsible Department official may upon request of any officer or employee, or on his own initiative, determine what constitutes legitimate need.

(2) Required to be disclosed under the Freedom of Information Act, 5 U.S.C. 552, and Part 5 of this title.

(3) For a routine use as defined in paragraph (j) of § 5b.1. Routine uses will be listed in any notice of a system of records. Routine uses published in Appendix B are applicable to more than one system of records. Where applicable, notices of systems of records may contain references to the routine uses listed in Appendix B. Appendix B will be published with any compendium of notices of systems of records.

(4) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13 U.S.C.

(5) To a recipient who has provided the agency with advance written assurance that the record will be used solely as a statistical research or reporting record; *Provided,* That, the record is transferred in a form that does not identify the subject individual.

(6) To the National Archives of the United States as a record which has sufficient historical or other value to

warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value.

(7) To another government agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of such government agency or instrumentality has submitted a written request to the Department specifying the record desired and the law enforcement activity for which the record is sought.

(8) To an individual pursuant to a showing of compelling circumstances affecting the health or safety of any individual if a notice of the disclosure is transmitted to the last known address of the subject individual.

(9) To either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee.

(10) To the Comptroller General, or any of the Comptroller General's authorized representatives, in the course of the performance of the duties of the General Accounting Office.

(11) Pursuant to the order of a court of competent jurisdiction.

(c) *Accounting of disclosures.* (1) An accounting of all disclosures of a record will be made and maintained by the Department for 5 years or for the life of the record, whichever is longer; *except that,* such an accounting will not be made:

(i) For disclosures under paragraphs (b) (1) and (2) of this section; and,

(ii) For disclosures made with the written consent of the subject individual.

(2) The accounting will include:

(i) The date, nature, and purpose of each disclosure; and

(ii) The name and address of the person or entity to whom the disclosure is made.

(3) Any subject individual may request access to an accounting of disclosures of a record. The subject individual shall make a request for access to an accounting in accordance with the procedures in § 5b.5 of this part. A subject individual will be granted access to an accounting of the disclosures of a record in accordance with the procedures of this part which govern access to the related record. Access to an accounting of a disclosure of a record made under paragraph (b)(7) of this section may be granted at the discretion of the responsible Department official.

§ 5b.10 Parents and guardians.

For the purpose of this part, a parent or guardian of any minor or the legal guardian or any individual who has been declared incompetent due to physical or mental incapacity or age by a court of competent jurisdiction is authorized to act on behalf of an individual or a subject individual. Except as provided in paragraph (b)(2) of § 5b.5, of this part governing procedures for verifying an individual's identity, an individual authorized to act on behalf of a minor or legal incompetent will be viewed as if he were the individual or subject individual.

§ 5b.11 Exempt systems.

(a) *General policy.* The Act permits certain types of specific systems of records to be exempt from some of its requirements. It is the policy of the Department to exercise authority to exempt systems of records only in compelling cases.

(b) *Specific systems of records exempted.* (1) Those systems of records listed in paragraph (b)(2) of this section are exempt from the following provisions of the Act and this part:

(i) 5 U.S.C. 552a(c)(3) and paragraph (c)(2) of § 5b.9 of this part which require a subject individual to be granted access to an accounting of disclosures of a record.

(ii) 5 U.S.C. 552a(d) (1) through (4) and (f) and §§ 5b.6, 5b.7, and 5b.8 of this part relating to notification of or access to records and correction or amendment of records.

(iii) 5 U.S.C. 552a(e)(4) (G) and (H) which require inclusion of information about Department procedures for notification, access, and correction or amendment of records in the notice for the systems of records.

(iv) 5 U.S.C. 552(e)(3) and paragraph (a)(3) of § 5b.4 of this part which require that an individual asked to provide a record to the Department be informed of the authority for providing the record (including whether the providing of the record is mandatory or voluntary, the principal purposes for maintaining the record, the routine uses for the record, and what effect his refusal to provide the record may have on him), and if the record is not required by statute or Executive Order to be provided by the individual, he agrees to provide the record. This exemption applies only to an investigatory record compiled by the Department for criminal law enforcement purposes in a system of records exempt under subsection (j)(2) of the Act to the extent that these requirements would prejudice the conduct of the investigation.

(2) The following systems of records are exempt from those provisions of the Act and this part listed in paragraph (b) (1) of this section.

(i) Pursuant to subsection (j)(2) of the Act:

The Investigatory Material Compiled for Law Enforcement Purposes System, ED.

(ii) Pursuant to subsection (k)(2) of the Act: Complaint Files and Log, Office for Civil Rights.

(iii) [Reserved]

(iv) Pursuant to subsection (k)(5) of the Act:

(A) The Investigatory Material Compiled for Security and Suitability Purposes System, ED; and,

(B) The Suitability for Employment Records, ED.

(c) *Notification of or access to records in exempt systems of records.* (1) Where a system of records is exempt as provided in paragraph (b) of this section, any individual may nonetheless request notification of or access to a record in that system. An individual shall make requests for notification of or access to a record in an exempt system of records in accordance with the procedures of §§ 5b.5 and 5b.6 of this part.

(2) An individual will be granted notification of or access to a record in an exempt system but only to the exten such notification or access would no reveal the identity of a source wh furnished the record to the Department under an express promise, an prior to September 27, 1975 an implie promise, that his identity would b held in confidence, if:

(i) The record is in a system o records which is exempt under subsection (k)(2) of the Act and the individual has been, as a result of the maintenance of the record, denied a right privilege, or benefit to which he woul otherwise be eligible; or,

(ii) The record is in a system o records which is exempt under subsection (k)(5) of the Act.

(3) If an individual is not granted notification of or access to a record in a system of records exempt under subsections (k) (2) and (5) of the Act in accordance with this paragraph, he will be informed that the identity of a confidential source would be revealed if notification of or access to the record were granted to him.

(d) *Discretionary actions by the responsible Department official.* Unless disclosure of a record to the general public is otherwise prohibited by law, the responsible Department official may in his discretion grant notification of or access to a record in a system of records which is exempt under paragraph (b) of this section. Discretionary notification of or access to a record in accordance with this paragraph will not be a precedent for discretionary notification of or access to a similar or related record and will not obligate the responsible Department official to exercise his discretion to grant notification of or access to any other record in a system of records which is exempt under paragraph (b) of this section.

[45 FR 30808, May 9, 1980, as amended at 48 FR 38820, Aug. 26, 1983]

§ 5b.12 Contractors.

(a) All contracts entered into on or after September 27, 1975 which require a contractor to maintain or on behalf of the Department to maintain, a system of records to accomplish a Department function must contain a provision requiring the contractor to comply with the Act and this part.

(b) All unexpired contracts entered into prior to September 27, 1975 which require the contractor to maintain or on behalf of the Department to maintain, a system of records to accomplish a Department function will be amended as soon as practicable to include a provision requiring the contractor to comply with the Act and this part. All such contracts must be so amended by July 1, 1976 unless for good cause the appeal authority identified in § 5b.8 of this part authorizes the continuation of the contract without amendment beyond that date.

(c) A contractor and any employee of such contractor shall be considered employees of the Department only for the purposes of the criminal penalties of the Act, 5 U.S.C. 552a(i), and the employee standards of conduct listed in Appendix A of this part where the contract contains a provision requiring the contractor to comply with the Act and this part.

(d) This section does not apply to systems of records maintained by a contractor as a result of his management discretion, *e.g.*, the contractor's personnel records.

§ 5b.13 Fees.

(a) *Policy.* Where applicable, fees for copying records will be charged in accordance with the schedule set forth in this section. Fees may only be charged where an individual requests that a copy be made of the record to which he is granted access. No fee may be charged for making a search of the system of records whether the search is manual, mechanical, or electronic. Where a copy of the record must be made in order to provide access to the record (*e.g.*, computer printout where no screen reading is available), the copy will be made available to the individual without cost.

(b) *Fee schedule.* The fee schedule for the Department is as follows:

(1) Copying of records susceptible to photocopying—$.10 per page.

(2) Copying records not susceptible to photocopying (*e.g.*, punch cards or magnetic tapes)—at actual cost to be determined on a case-by-case basis.

(3) No charge will be made if the total amount of copying does not exceed $25.

APPENDIX A TO PART 5b—EMPLOYEE STANDARDS OF CONDUCT

(a) *General.* All employees are required to be aware of their responsibilities under the Privacy Act of 1974, 5 U.S.C. 552a. Regulations implementing the Act are set forth in 34 CFR 5b. Instruction on the requirements of the Act and regulation shall be provided to all new employees of the Department. In addition, supervisors shall be responsible for assuring that employees who are working with systems of records or who undertake new duties which require the use of systems of records are informed of their responsibilities. Supervisors shall also be responsible for assuring that all employees who work with such systems of records are periodically reminded of the requirements of the Act and are advised of any new provisions or interpretations of the Act.

(b) *Penalties.* (1) All employees must guard against improper disclosure of records which are governed by the Act. Because of the serious consequences of improper invasions of personal privacy, employees may be subject to disciplinary action and criminal prosecution for knowing and willful violations of the Act and regulation. In addition, employees may also be subject to disciplinary action for unknowing or unwillful violations, where the employee had notice of the provisions of the Act and regulations and failed to inform himself sufficiently or to conduct himself in accordance with the requirements to avoid violations.

(2) The Department may be subjected to civil liability for the following actions undertaken by its employees:

(a) Making a determination under the Act and §§ 5b.7 and 5b.8 of the regulation not to amend an individual's record in accordance with his request, or failing to make such review in conformity with those provisions;

(b) Refusing to comply with an individual's request for notification of or access to a record pertaining to him;

(c) Failing to maintain any record pertaining to any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such a record, and consequently a determination is made which is adverse to the individual; or

(d) Failing to comply with any other provision of the Act or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual.

(3) "An employee may be personally subject to criminal liability as set forth below and in 5 U.S.C. 552a (i):

(a) Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by the Act or by rules or regulations established thereunder, and who, knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000."

(b) "Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements [of the Act] shall be guilty of a misdemeanor and fined not more than $5,000."

(c) *Rules Governing Employees Not Working With Systems of Records.* Employees whose duties do not involve working with systems of records will not generally disclose to any one, without specific authorization from their supervisors, records pertaining to employees or other individuals which by reason of their official duties are available to them. Notwithstanding the above, the following records concerning Federal employees are a matter of public record and no further authorization is necessary for disclosure:

(1) Name and title of individual.

(2) Grade classification or equivalent and annual rate of salary.

(3) Position description.

(4) Location of duty station, including room number and telephone number.

In addition, employees shall disclose records which are listed in the Department's Freedom of Information Regulation as being available to the public. Requests for other records will be referred to the responsible Department official. This does not preclude employees from discussing matters which are known to them personally, and without resort to a record, to official investigators of Federal agencies for official purposes such as suitability checks, Equal Employment Opportunity investigations, adverse action proceedings, grievance proceedings, etc.

(d) *Rules governing employees whose duties require use or reference to systems of records.* Employees whose official duties require that they refer to, maintain, service, or otherwise deal with systems of records (hereinafter referred to as "Systems Employees") are governed by the general provisions. In addition, extra precautions are required and systems employees are held to higher standards of conduct.

(1) Systems Employees shall:

(a) Be informed with respect to their responsibilities under the Act;

(b) Be alert to possible misuses of the system and report to their supervisors any potential or actual use of the system which they believe is not in compliance with the Act and regulation;

(c) Make a disclosure of records within the Department only to an employee who has a legitimate need to know the record in the course of his official duties;

(d) Maintain records as accurately as practicable.

(e) Consult with a supervisor prior to taking any action where they are in doubt whether such action is in conformance with the Act and regulation.

(2) Systems Employees shall not:

(a) Disclose in any form records from a system of records except (1) with the consent or at the request of the subject individual; or (2) where its disclosure is permitted under § 5b.9 of the regulation.

(b) Permit unauthorized individuals to be present in controlled areas. Any unauthorized individuals observed in controlled areas shall be reported to a supervisor or to the guard force.

(c) Knowingly or willfully take action which might subject the Department to civil liability.

(d) Make any arrangements for the design development, or operation of any system of records without making reasonable effort to provide that the system can be maintained in accordance with the Act and regulation.

(e) *Contracting officers.* In addition to any applicable provisions set forth above, those employees whose official duties involve entering into contracts on behalf of the Department shall also be governed by the following provisions:

(1) *Contracts for design, or development of systems and equipment.* No contract for the design or development of a system of records, or for equipment to store, service or maintain a system of records shall be entered into unless the contracting officer has made reasonable effort to ensure that the product to be purchased is capable of being used without violation of the Act or regulation. Special attention shall be given to provision of physical safeguards.

(2) *Contracts for the operation of systems and equipment.* No contract for the design or development of a system of whom he feels appropriate, of all proposed contracts providing for the operation of systems of records shall be made prior to execution of the contracts to determine whether operation of the system of records is for the purpose of accomplishing a Department function. If a determination is made that the operation of the system is to accomplish a Department function, the contracting officer shall be responsible for including in the contract appropriate provisions to apply the provisions of the Act and regulation to the

system, including prohibitions against improper release by the contractor, his employees, agents, or subcontractors.

(3) *Other service contracts.* Contracting officers entering into general service contracts shall be responsible for determining the appropriateness of including provisions in the contract to prevent potential misuse (inadvertent or otherwise) by employees, agents, or subcontractors of the contractor.

(f) *Rules Governing Responsible Department Officials.* In addition to the requirements for Systems Employees, responsible Department officials shall:

(1) Respond to all requests for notification of or access, disclosure, or amendment of records in a timely fashion in accordance with the Act and regulation;

(2) Make any amendment of records accurately and in a timely fashion;

(3) Inform all persons whom the accounting records show have received copies of the record prior to the amendments of the correction; and

(4) Associate any statement of disagreement with the disputed record, and

(a) Transmit a copy of the statement to all persons whom the accounting records show have received a copy of the disputed record, and

(b) Transmit that statement with any future disclosure.

APPENDIX B TO PART 5b—ROUTINE USES APPLICABLE TO MORE THAN ONE SYSTEM OF RECORDS MAINTAINED BY ED

(1) In the event that a system of records maintained by this agency to carry out its functions indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether federal, or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto.

(2) Referrals may be made of assignments of research investigators and project monitors to specific research projects to the Smithsonian Institution to contribute to the Smithsonian Science Information Exchange, Inc.

(3) In the event the Department deems it desirable or necessary, in determining whether particular records are required to be disclosed under the Freedom of Information Act, disclosure may be made to the Department of Justice for the purpose of obtaining its advice.

(4) A record from this system of records may be disclosed as a "routine use" to a federal, state or local agency maintaining civil, criminal or other relevant enforcement records or other pertinent records, such as current licenses, if necessary to obtain a record relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant or other benefit.

A record from this system of records may be disclosed to a federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the record is relevant and necessary to the requesting agency's decision on the matter.

(5) In the event that a system of records maintained by this agency to carry out its function indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether state or local charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto.

(6) Where federal agencies having the power to subpoena other federal agencies' records, such as the Internal Revenue Service or the Civil Rights Commission, issue a subpoena to the Department for records in this system of records, the Department will make such records available.

(7) Where a contract between a component of the Department and a labor organization recognized under E.O. 11491 provides that the agency will disclose personal records relevant to the organization's mission, records in this system of records may be disclosed to such organization.

(8) Where the appropriate official of the Department, pursuant to the Department's Freedom of Information Regulation determines that it is in the public interest to disclose a record which is otherwise exempt from mandatory disclosure, disclosure may be made from this system of records.

(9) The Department contemplates that it will contract with a private firm for the purpose of collating, analyzing, aggregating or otherwise refining records in this system. Relevant records will be disclosed to such a contractor. The contractor shall be required

to maintain Privacy Act safeguards with respect to such records.

(10) To individuals and organizations, deemed qualified by the Secretary to carry out specific research solely for the purpose of carrying out such research.

(11) Disclosures in the course of employee discipline or competence determination proceedings.

[45 FR 30808, May 9, 1980; 45 FR 37426, June 3, 1980]

PART 6—INVENTIONS AND PATENTS (GENERAL)

Sec.
6.0 General policy.
6.1 Publication or patenting of inventions.
6.3 Licensing of Government-owned patents.
6.4 Central records; confidentiality.

AUTHORITY: 5 U.S.C. 301.

SOURCE: 45 FR 30814, May 9, 1980, unless otherwise noted.

§ 6.0 General policy.

Inventions developed through the resources and activities of the Department are a potential resource of great value to the public. It is the policy of the Department:

(a) To safeguard the public interest in inventions developed by Department employees, contractors and grantees with the aid of public funds and facilities;

(b) To encourage and recognize individual and cooperative achievement in research and investigations; and

(c) To establish a procedure, consistent with pertinent statutes, Executive orders and general Government regulations, for the determination of rights and obligations relating to the patenting of inventions.

§ 6.1 Publication or patenting of inventions.

It is the general policy of the Department that the results of Department research should be made widely, promptly and freely available to other research workers and to the public. This availability can generally be adequately preserved by the dedication of a Government-owned invention to the public. Determinations to file a domestic patent application on inventions in which the Department has an interest will be made where the circumstances indicate that this is desirable in the public interest, and if it is practicable to do so. Department determinations not to apply for a domestic patent on employee inventions are subject to review and approval by the Commissioner of Patents. Except where deemed necessary for protecting the patent claim, the fact that a patent application has been or may be filed will not require any departure from normal policy regarding the dissemination of the results of Department research.

§ 6.3 Licensing of Government-owned patents.

(a) Licenses to practice inventions covered by patents and pending patent applications owned by the U.S. Government as represented by this Department will generally be royalty free, revocable and nonexclusive. They will normally be issued to all applicants and will generally contain no limitations or standards relating to the quality or testing of the products to be manufactured, sold, or distributed thereunder.

(b) Where it appears however that the public interest will be served under the circumstances of the particular case by licenses which impose conditions, such as those relating to quality or testing of products, requirement of payment of royalties to the Government, etc., or by the issuance of limited exclusive licenses by the Secretary after notice and opportunity for hearing thereon, such licenses may be issued.

§ 6.4 Central records; confidentiality.

Central files and records shall be maintained of all inventions, patents, and licenses in which the Department has an interest, together with a record of all licenses issued by the Department under such patents. Invention reports required from employees or others for the purpose of obtaining determinations of ownership, and documents and information obtained for the purpose of prosecuting patent applications shall be confidential and shall be disclosed only as required for official purposes or with the consent of the inventor.

PART 7—EMPLOYEE INVENTIONS

Sec.

7.0 Who are employees.
7.1 Duty of employee to report inventions.
7.3 Determination as to domestic rights.
7.4 Option to acquire foreign rights.
7.7 Notice to employee of determination.
7.8 Employee's right of appeal.

AUTHORITY: E.O. 10096, 15 FR 391; 3 CFR 1950 Supp.; E.O. 10930, 26 FR 2583; 3 CFR 1961 Supp.

SOURCE: 45 FR 30814, May 9, 1980, unless otherwise noted.

§ 7.0 Who are employees.

As used in this part, the term "Government employee" means any officer or employee, civilian or military, except such part-time employees or part-time consultants as may be excluded therefrom by a determination made in writing by the head of the employee's office or constituent organization, pursuant to an exemption approved by the Commissioner of Patents that to include him or them would be impracticable or inequitable, given the reasons therefor. A person shall not be considered to be a part-time employee or part-time consultant for this purpose unless the terms of his employment contemplate that he shall work for less than the minimum number of hours per day, or less than a minimum number of days per week, or less than the minimum number of weeks per year, regularly required of full-time employees of his class.

§ 7.1 Duty of employee to report inventions.

Every Department employee is required to report to the Secretary in accordance with the procedures established therefor, every invention made by him (whether or not jointly with others) which bears any relation to his official duties or which was made in whole or in any part during working hours, or with any contribution of Government facilities, equipment, material, funds, or information, or of time or services of other Government employees on official duty.

§ 7.3 Determination as to domestic rights.

The determination of the ownership of the domestic right, title, and interest in and to an invention which is or may be patentable, made by a Government employee while under the administrative jurisdiction of the Department, will be made in writing by the Secretary in accordance with the provisions of Executive Order 10096 and Government-wide regulations issued thereunder by the Commissioner of Patents as follows:

(a) The Government as represented by the Secretary shall obtain the entire domestic right, title and interest in and to all inventions made by any Government employee (1) during working hours, or (2) with a contribution by the Government of facilities, equipment, materials, funds, or information, or of time or services of other Government employees on official duty, or (3) which bear a direct relation to or are made in consequence of the official duties of the inventor.

(b) In any case where the contribution of the Government, as measured by any one or more of the criteria set forth in paragraph (a) of this section, to the invention is insufficient equitably to justify a requirement of assignment to the Government of the entire domestic right, title and interest in and to such invention, or in any case where the Government has insufficient interest in an invention to obtain the entire domestic right, title, and interest therein (although the Government could obtain same under paragraph (a) of this section), the Department, subject to the approval of the Commissioner, shall leave title to such invention in the employee, subject, however, to the reservation to the Government of a nonexclusive, irrevocable, royalty-free license in the invention with power to grant licenses for all governmental purposes, such reservation to appear, where practicable, in any patent, domestic or foreign, which may issue on such invention.

(c) In applying the provisions of paragraphs (a) and (b) of this section, to the facts and circumstances relating to the making of any particular invention, it shall be presumed that an invention made by an employee who is employed or assigned (1) to invent or improve or perfect any art, machine, manufacture, or composition of matter, (2) to conduct or perform research, development work, or both, (3) to supervise, direct, coordinate, or review Government financed or conducted research, development work, or both, or (4) to act in a liaison capacity among governmental or nongovernmental agencies or individuals engaged in such work, falls within the provisions of paragraph (a) of this section, and it shall be presumed that any invention made by any other employee falls within the provisions of paragraph (b) of this section. Either presumption may be rebutted by a showing of the facts and circumstances and shall not preclude a determination that these facts and circumstances justify leaving the entire right, title and interest in and to the invention in the Government employee, subject to law.

(d) In any case wherein the Government neither (1) obtains the entire domestic right, title and interest in and to an invention pursuant to the provisions of paragraph (a) of this section, nor (2) reserves a nonexclusive, irrevocable, royalty-free license in the invention, with power to grant licenses for all governmental purposes, pursuant to the provisions of paragraph (b) of this section, the Government shall leave the entire right, title and interest in and to the invention in the Government employee, subject to law.

§ 7.4 Option to acquire foreign rights.

In any case where it is determined that all domestic rights should be assigned to the Government, it shall further be determined, pursuant to Executive Order 9865 and Government-wide regulations issued thereunder, that the Government shall reserve an option to require the assignment of such rights in all or in any specified foreign countries. In case where the inventor is not required to assign the patent rights in any foreign country or countries to the Government or the Government fails to exercise its option within such period of time as may be provided by regulations issued by the Commissioner of Patents, any application for a patent which may be filed in such country or countries by the inventor or his assignee shall nevertheless be subject to a nonexclusive, irrevocable, royalty-free license to the Government for all governmental purposes, including the power to issue sublicenses for use in behalf of the Government and/or in furtherance of the foreign policies of the Government.

§ 7.7 Notice to employee of determination.

The employee-inventor shall be notified in writing of the Department's determination of the rights to his invention and of his right of appeal, if any. Notice need not be given if the employee stated in writing that he would agree to the determination of ownership which was in fact made.

§ 7.8 Employee's right of appeal.

An employee who is aggrieved by a determination of the Department may appeal to the Commissioner of Patents, pursuant to section 4(d) of Executive Order 10096, as amended by Executive Order 10930, and regulations issued thereunder, by filing a written appeal with the Commissioner, in duplicate, and a copy of the appeal with the Secretary within 30 days (or such longer period as the Commissioner may, for good cause, fix in any case) after receiving written notice of such determination.

PART 11—ADVISORY COMMITTEE MANAGEMENT

Subpart A—General

Sec.

11.1 What is the purpose of these regulations?
11.2 What committees are governed by these regulations?
11.3 What definitions apply to these regulations?
11.4 What kind of group is an advisory committee?
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11.30 What meeting requirements affect advisory committees?
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11.33 What notice is required for advisory committee and subcommittee meetings?
11.34 What public participation is allowed at advisory committee meetings?
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11.37 How is the agenda established and distributed?
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11.39 What reports are made by advisory committees?
11.40 What records must an advisory committee make available to the public?

AUTHORITY: 5 U.S.C. App. 2; 20 U.S.C. 1233 *et seq*, unless otherwise noted.

SOURCE: 52 FR 25152, July 2, 1987, unless otherwise noted.

Subpart A—General

§ 11.1 What is the purpose of these regulations?

The regulations in this part:

(a) Implement the Federal Advisory Committee Act, as amended; and

(b) Provide guidance for advisory committees that are governed by Part D of the General Education Provisions Act, as amended.

(Authority: 5 U.S.C. App. 2; 20 U.S.C. 1233 *et seq.*)

§ 11.2 What committees are governed by these regulations?

(a) The regulations in this part apply to all advisory committees and their subcommittees providing advice to the Secretary or any other official of the Department. These regulations do not apply to any entity governed by the Government in the Sunshine Act.

(b) The functions of an advisory committee are to be solely advisory. If a group provides advice to the Department, but the group's advisory function is incidental to and inseparable from other (*e.g.*, operational) functions, these regulations do not apply. However, if the advisory function is separable, the group is subject to these regulations to the extent that the group operates as an advisory committee.

(Authority: 5 U.S.C. App. 2; 20 U.S.C. 1233 *et seq.*)

§ 11.3 What definitions apply to these regulations?

(a) *Definitions in EDGAR*. The following terms used in this part are defined in 34 CFR 77.1:

Department
ED
EDGAR
GEPA
Secretary

(b) *Definitions that apply to this part.* That following definitions also apply to this part:

Administrator means Administrator of the General Services Administration.

Advisory Committee or *Committee*, subject to the factors and exclusions described in §§ 11.4 and 11.5, means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof, which is established by statute or reorganization plan, or established or utilized by the Secretary in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.

Committee Management Officer or *CMO* is the ED employee designated as required by Section 8 of FACA.

Committee Member means an individual who serves by appointment on an advisory committee and, except as otherwise limited by statute or the terms under which the committee is established, has the full right and obligation to participate in the activities of the committee, including voting rights.

Designated Federal Official (DFO) means the ED employee designated for each committee who performs duties under sections 10 (e) and (f) of FACA. The DFO is an employee who holds a full-time permanent position in the Department and may be assigned other administrative duties in connection with the committee.

Executive Director means the person who has that title and is responsible for overseeing the daily operation or staff or both of an advisory committee.

FACA means the Federal Advisory Committee Act, as amended, 5 U.S.C. Appendix 2.

GEPA Presidential Advisory Committee means a statutory advisory committee, governed by Part D of GEPA, the members of which are appointed by the President.

GSA Committee Management Secretariat is the office within the General Services Administration that administers FACA.

Nonstatutory Advisory Committee means an advisory committee established by the Secretary under section 442 of GEPA or by the President.

OMB means the Office of Management and Budget.

Presidential Advisory Committee as defined by FACA means an advisory committee which advises the President.

Statutory Advisory Committee means an advisory committee established by or pursuant to statute other than section 442 of GEPA.

(Authority: 5 U.S.C. App. 2; 20 U.S.C. 1233 *et seq.*)

§ 11.4 What kind of group is an advisory committee?

Although no single factor is determinative in deciding whether a group is an advisory committee, the following factors are significant:

(a) Fixed membership, including at least one person who is not a full-time Federal employee.

(b) Establishment by a Federal official or law. If not Federally established, the initiative for its use as an advisory body for the Federal Government comes from a Federal official rather than from a private group.

(c) A purpose of providing consensus advice regarding a particular subject or subjects.

(d) An organizational structure, *e.g.*, officers and staff.

(e) Regular or periodic meetings.

(Authority: 5 U.S.C. App. 2)

§ 11.5 What kind of group is excluded from these regulations?

Groups excluded from the effect of the regulations in this part include:

(a) Any committee which is composed wholly of full-time officers or employees of the Federal Government;

(b) Any committee which is exclusively operational in nature (*e.g.*, has functions which include making or implementing decisions, as opposed to the offering of advice or recommendations);

(c) Any local civic group whose primary function is that of rendering a public service with respect to a Federal program;

(d) Any State or local committee or similar group established to advise State or local officials or agencies; and

(e) Any body governed by the Government in the Sunshine Act, 5 U.S.C. 552b.

(Authority: 5 U.S.C. App. 2; 20 U.S.C. 1233 *et seq.*; 5 U.S.C. 552b)

Subpart B—What are the Procedures for the Establishment or Renewal of an Advisory Committee?

§ 11.10 How does the Secretary establish or renew an advisory committee?

(a) To establish or renew a non-statutory advisory committee, the Secretary:

(1) Determines that the committee is essential to the conduct of ED business and in the public interest and that its functions cannot otherwise be

performed effectively within the Department or by an existing advisory committee;

(2) Consults with the Administrator;

(3) After the consultation, publishes a notice in the FEDERAL REGISTER at least 15 days before filing a charter for the advisory committee; and

(4) Files a charter.

(b) To establish or renew a statutory advisory committee, the Secretary:

(1) Notifies the GSA Committee Management Secretariat that the advisory committee is established or renewed pursuant to its enabling legislation; and

(2) Files a charter.

(Authority: 5 U.S.C. App. 2; 20 U.S.C 1233a)

§ 11.11 When is an advisory committee renewed?

(a) Except for an advisory committee established under section 442 of GEPA, the Secretary makes a renewal determination not more than 60 days before the scheduled date of termination of an advisory committee.

(b) A nonstatutory advisory committee established under section 442 of GEPA terminates not later than one year from the date of its creation, unless the Secretary determines in writing not more than 30 days prior to the expiration of the one-year period that renewal for a period not to exceed one year is necessary to complete the recommendations or reports for which it was established.

(c) For an advisory committee authorized by Congress for more than two years, the Secretary recharters the committee at the end of each two-year period.

(Authority: 5 U.S.C. App. 2; 20 U.S.C. 1233a)

§ 11.12 How is an advisory committee chartered?

(a) An advisory committee charter must contain in a format approved by the Secretary:

(1) The committee's official designation;

(2) The committee's objectives and the scope of its activity;

(3) The period of time necessary for the committee to carry out its purpose;

(4) The official to whom the committee reports;

(5) The official responsible for providing the necessary support for the committee;

(6) A description of the duties for which the committee is responsible, including the specific authority for any non-advisory functions;

(7) The estimated annual operating costs in dollars and person-years for the committee;

(8) The estimated number and frequency of committee meetings;

(9) The committee's termination date;

(10) The date the charter is approved by the Secretary; and

(11) The filing date.

(b) The Committee Management Officer includes information concerning a subcommittee in the charter of the parent committee if this information is known at the time of establishment or renewal. This information includes:

(1) The subcommittee's name;

(2) A brief description of the functions of the subcommittee; and

(3) The frequency of meetings.

(c) If an advisory committee is being established or renewed and the functions of a subcommittee are not known at the time of establishment or renewal, the Committee Management Officer includes in the charter of the parent committee general language authorizing the parent committee to appoint subcommittees.

(d) The Committee Management Officer files the charter with the appropriate standing committees of the Senate and House of Representatives, and the Library of Congress. A copy is also filed with the GSA Committee Management Secretariat.

(Authority: 5 U.S.C. App. 2)

§ 11.13 When can an advisory committee meet or take action?

An advisory committee must be properly established or renewed, and chartered, as provided in §§11.10, 11.11 and 11.12, before it can meet or take any action.

(Authority: 5 U.S.C. App. 2)

Subpart C—What are the General Requirements for Committee and Subcommittee Membership?

§ 11.20 Who may be a member of a committee or subcommittee?

(a) In the selection of committee and subcommittee members, there must be no discrimination on the basis of race, national origin, religion, creed, age, sex, or handicap.

(b) All members of a subcommittee must be drawn from the parent committee unless expressly allowed by statute.

(Authority: 5 U.S.C. App. 2; 20 U.S.C. 1233 *et seq.*)

§ 11.21 What action may be taken by a subcommittee?

(a) Subcommittees shall act under the policies that have been established by the parent committee and shall comply with the requirements of FACA and applicable Department regulations.

(b) Unless expressly authorized by charter or by the full committee in advance, all recommendations and findings of subcommittees must be presented to the parent committee for subsequent action.

(Authority: 5 U.S.C. App. 2)

Subpart D—How Does an Advisory Committee Operate?

§ 11.30 What meeting requirements affect advisory committees?

(a) The DFO is not required to call, chair, attend or adjourn meetings of GEPA Presidential advisory committees. Meetings may be held and conducted without the DFO being present. The DFO does not approve the agenda for these meetings.

(b)(1) For Presidential advisory committees not governed by the provisions of GEPA, the DFO is required to:

(i) Call or approve meetings in advance; and

(ii) Chair or attend these meetings.

(2) The DFO is authorized, whenever he or she determines it to be in the public interest, to adjourn any meeting.

(3) Meetings may not be conducte
in the absence of the DFO.

(4) The DFO does not approve th
agenda for these meetings.

(c)(1) For committees other tha
those covered by paragraph (a) or (
of this section, the DFO is required t

(i) Call or approve meetings in a
vance; and

(ii) Chair or attend these meetings.

(2) The DFO is authorized, whe
ever he or she determines it to be i
the public interest, to adjourn the
meetings.

(3) Meetings may not be conducte
in the absence of the DFO.

(4) The DFO approves the agend
for these meetings.

(Authority: 5 U.S.C. App. 2; 20 U.S.C. 12
et seq.)

§ 11.31 What is a quorum?

(a) An advisory committee shall no
hold a meeting and take any action o
its deliberations without a quorum
Unless otherwise required by statut
or provided in a committee's charter,
quorum consists of the majority of th
committee's authorized membershi
including *ex officio* members.

(b) For a subcommittee, a quorum i
the majority of the authorized mem
bership of the subcommittee.

(Authority: 5 U.S.C. App. 2)

§ 11.32 What special provisions govern th voting rights of certain committe members?

(a) An *ex officio* committee membe
or a committee member who is a full-
time Federal employee may delegat
his or her committee duties, including
voting rights. An advisory committee
member who is not a Federal employee may not delegate his or her duties,
including voting rights, unless a delegation is explicitly permitted by legislation establishing the committee.

(b) Unless provided in the legislation or charter governing a committee, *ex officio* members of committees must have full voting rights.

(Authority: 5 U.S.C. App. 2)

§ 11.33 What notice is required for advisory committee and subcommittee meetings?

(a)(1) Unless the Administrator determines otherwise for reasons of national security, or except as otherwise provided in the regulations in this part, notice of each advisory committee or subcommittee meeting must be published in the FEDERAL REGISTER. This requirement applies even if all or a part of a meeting is closed to the public.

(2) Except for emergency meetings, notice of advisory committee or subcommittee meetings must be published in the FEDERAL REGISTER at least 15 days prior to the meeting. If a meeting is called and must be held without 15 days' notice, the reasons for failure to give the full 15-day notice must be included in the FEDERAL REGISTER notice.

(b) All notices, including those for emergency meetings, must state:

(1) The name of the advisory committee;

(2) The date, time, and place of the meeting;

(3) The purpose of the meeting, including a summary of the agenda;

(4) The extent to which the public will be permitted to attend or participate in the meeting;

(5) The reasons for closing any portion of the meeting, including the appropriate exemption from the Government in the Sunshine Act, 5 U.S.C. 552b(c); and

(6) Where records of the meeting, including a summary of any closed portion, are available for public inspection.

(c) If a meeting is postponed or canceled, a notice must be published in the FEDERAL REGISTER to inform the general public of the change.

(d) In addition to the notice of meeting published in the FEDERAL REGISTER, the Executive Director or DFO of each advisory committee shall maintain a list of persons and organizations who have requested to be notified of all meetings and notify them by mail in advance of each meeting. Other forms of notice, such as press releases and notices in professional journals, may be used by the Executive Director or DFO to the extent practicable.

(Authority: 5 U.S.C. App. 2; 5 U.S.C. 552b(c))

§ 11.34 What public participation is allowed at advisory committee meetings?

(a) Subject to the exception in § 11.35, each advisory committee meeting must be open to the public, and interested persons must be permitted to attend, appear before, or file statements with the advisory committee in accordance with this section.

(b) With respect to any advisory committee meeting, all or part of which is open to the public, the Executive Director or DFO of each committee shall ensure compliance with the following rules:

(1) Meetings must be held at reasonable times and at places that are reasonably accessible to members of the public. If feasible, Government facilities must be used and meetings held in places involving the least expense to the Government.

(2) The size of the meeting room must be reasonable, considering such factors as the number of committee members, committee staff, Department employees, and interested persons from the general public expected to attend.

(3) Any member of the public may file a written statement with the committee, either before or within a reasonable time after a meeting.

(4) If time permits and advance approval has been obtained from the Chairperson, Executive Director, or DFO, interested persons may present oral statements. If the Chairperson has given authorization, the committee may respond to questions from the public.

(5) The Chairperson or the designee of the Chairperson shall make a written request to the Secretary for approval of any meeting held outside the Washington, D.C. area and provide a narrative justificaton for the request. Before the meeting can be held, proper authorization must be given by the Secretary.

(Authority: 5 U.S.C. App. 2)

§ 11.35 What are the requirements for closing a meeting?

(a) All or part of an advisory committee meeting may be closed to the public if the Secretary determines in writing that closing is warranted under an exemption in the Government in the Sunshine Act.

(b) To request closing all of part of a meeting, the Chairperson or the Chairperson's designee shall make a written request to the Secretary at least 30 days before the date of the meeting, except in emergency circumstances. The request must contain the reasons for the closed meeting and the Government in the Sunshine Act exemption that authorizes the closing.

(c) In requesting the closing of all or part of a meeting, the Chairperson or the designee of the Chairperson shall:

(1) Restrict the closing to the shortest reasonable time;

(2) Request closing only the portion of the meeting dealing with exempt matters if several separable matters will be considered, not all of which are within the exemptions; and

(3) Arrange the agenda to facilitate attendance by the public at the open portion of the meeting.

(d) Committee members, committee staff, and interested Department officials or employees may attend closed or partially closed meetings.

(e) Within 14 days after the closed or partially closed meeting, advisory committees shall make available to the public a written summary report of the closed deliberations consistent with the policy of the Government in the Sunshine Act.

(Authority: 5 U.S.C. App. 2; 5 U.S.C. 552b(c))

§ 11.36 What special procedures may be used for emergency advisory committee meetings?

(a) In emergency circumstances, the Secretary may permit a committee to conduct its business by a telephone conference call, under the procedures in this section.

(b) In determining whether conducting a meeting by telephone conference call is justified, the Secretary considers:

(1) Whether the nature of the emergency is critical to the operation of the committee, but not sufficient to justify holding a regular meeting;

(2) Whether the meeting involves committee projects or assignments with very short deadlines requiring assistance from an advisory committee, and whether there is enough time to convene a regular meeting; and

(3) Whether the Secretary requires advice or important information from the committee, but the Department is under financial constraints that prevent the expenditure of Federal funds for the expenses of convening a regular meeting.

(c)(1) If an advisory committee calls an emergency meeting by telephone conference call, the committee Chairperson or the Chairperson's designee shall provide the Secretary with a written request for the meeting including a justification explaining the necessity and urgency for the meeting.

(2) The Secretary publishes a notice in the FEDERAL REGISTER informing the general public of the intent to have a meeting by telephone conference call. The notice specifies how the public will have access to the meeting. At a minimum, one participating member must be in a room with seating space for the public and telephonic devices that permit the public to hear and to participate in the deliberations to the extent provided by § 11.34.

(3) The Chairperson or the Chairperson's designee shall ensure that detailed minutes of the proceedings are accurately taken and filed in the committee's staff office and that the meeting complies with any other applicable laws and regulations.

(Authority: 5 U.S.C. App. 2)

§ 11.37 How is the agenda established and distributed?

(a) The Committee Chairperson or the Chairperson's designee shall distribute advance copies of a committee's agenda to committee members, Departmental officials, and interested individuals, groups or organizations at least two days prior to the date of the meeting.

(b) The agenda must include the matters to be discussed and considered at the meeting, and state whether any portion of the meeting is closed to the public.

(Authority: 5 U.S.C. App. 2)

§ 11.38 What records are kept of advisory committee meetings?

(a) The Chairperson or the Chairperson's designee shall ensure that an advisory committee keeps detailed minutes of each meeting, including meetings of subcommittees, unless a verbatim transcript is made of the meeting.

(b) The minutes must include:

(1) The date, time and place of the meeting;

(2) A list of committee members, committee staff, Federal employees, and an estimated number of the general public present at the meeting;

(3) A detailed summary of matters discussed at the meeting, including different positions taken and conclusions reached by the committee;

(4) Copies of all reports, papers, and other documents received, issued, or approved by the committee;

(5) An explanation of the extent to which the meeting was open to the public and the public participated in the proceedings; and

(6) A list of the public participants who presented oral or written statements.

(c) The Chairperson or Chairperson's designee shall ensure that minutes are completed within a reasonable time after the meeting. The Chairperson shall certify the accuracy of the minutes.

(d) A copy of the minutes must be kept on file by the advisory committee, and a copy must be sent to the Committee Management Officer.

(Authority: 5 U.S.C. App. 2)

§ 11.39 What reports are made by advisory committees?

(a) Each statutory and non-statutory advisory committee shall make an annual report of its activities, findings, and recommendations to the Congress not later than March 31, which is submitted with the Secretary's annual report to Congress. Each committee's annual report must cover committee activities for the preceding fiscal year.

(b) Statutory advisory committees shall prepare reports that are mandated by their enabling legislation.

(c) Copies of all reports must be submitted to the Committee Management Officer.

(Authority: 5 U.S.C. App. 2; 20 U.S.C. 1233 *et seq.*)

§ 11.40 What records must an advisory committee make available to the public?

(a) All records, reports, and other documents on advisory committees are available for public inspection and copying consistent with the Department's Freedom of Information Act regulations, 34 CFR Part 5.

(b) Copies of transcripts of committee proceedings or meetings are available at a cost determined under the fee schedule in 34 CFR 5.61.

(Authority: 5 U.S.C. App. 2)

PART 12—DISPOSAL AND UTILIZATION OF SURPLUS REAL PROPERTY FOR EDUCATIONAL PURPOSES

Sec.

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Exhibit A—Public Benefit Allowance for Transfer of Real Property for Educational Purposes

AUTHORITY: Sec. 203, 63 Stat. 385, as amended; 40 U.S.C. 484.

SOURCE: 45 FR 30820, May 9, 1980, unless otherwise noted.

§ 12.1 Definitions.

(a) "Act" means the Federal Property and Administrative Services Act of 1949, 63 Stat. 377 (40 U.S.C. 471 et seq.). Terms defined in the Act and not defined in this section have the meanings given to them in the Act.

(b) "Accredited" means having the approval of a recognized accreditation board or association on a regional, State, or national level, such as a State Board of Education, State University, or the Middle States Association of College and Secondary Schools. "Approval" as used above describes the formal process carried out by State Agencies and institutions in determining that educational organizations or programs meet minimum acceptance standards. A college, university, or secondary school may be said to be accredited if the credits issued by it are and have been accepted for transfer purposes by no fewer than three accredited colleges, universities, or secondary schools not connected or associated with it.

(c) "Administrator" means the Administrator of General Services.

(d) "Assigned property" means real and related personal property which, in the discretion of the Administrator or his designee, has been made available to the Department for transfer for educational purposes.

(e) "Department" means the U.S. Department of Education.

(f) "Disposal agency" means the executive agency of the Government which has authority to assign property to the Department for transfer for educational purposes.

(g) "Excess" means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof.

(h) "Fair market value" means the highest price which the property will bring by sale in the open market by a willing seller to a willing buyer.

(i) "Holding agency" means the Federal agency which has control over and accountability for the property involved.

(j) "Nonprofit institution" means any institution, organization, or association, whether incorporated or unincorporated, no part of the net earnings of which inures or may lawfully inure to the benefit of any private shareholder or individual, and which has been held to be tax-exempt under sec tion 501(c)(3) of the Internal Revenu Code of 1954.

(k) "Off-site property" means sur plus buildings, utilities and all othe removable improvements, including re lated personal property, to be trans ferred by the Department for remova and use away from the site for educa tional purposes.

(l) "On-site" means surplus rea property, including related persona property, to be transferred by the De partment for use in place for educa tional purposes.

(m) "Public benefit allowance" means a discount on the sale or lease price of real property transferred for educational purposes, representing any benefit determined by the Secretary which has accrued or may accrue to the United States thereby.

(n) "Related personal property" means any personal property: (1) Which is located on and is (i) an integral part of, or (ii) useful in the operation of real property; or (2) which is determined by the Administrator to be otherwise related to the real property.

(o) "Secretary" means the Secretary of Education.

(p) "State" means a State of the United States, and includes the District of Columbia, the Commonwealth of Puerto Rico, and the Territories and possessions of the United States.

(q) "Surplus" when used with respect to real property means any excess real property not required for the needs and the discharge of the responsibilities of all Federal agencies as determined by the Administrator.

§ 12.2 Scope.

This part is applicable to surplus real property located within any State which is appropriate for assignment to, or which has been assigned to, the Department for transfer for educational purposes, as provided for in section 203(k) of the Act.

§ 12.3 General policies.

(a) It is the policy of the Department to foster and assure maximum utilization of surplus real property for educational purposes, including research.

(b) Transfers may be made only to States, their political subdivisions and instrumentalities, tax-supported educational institutions, and nonprofit educational institutions which have been held tax-exempt under section 501(c)(3) of the Internal Revenue Code of 1954.

(c) Real property will be requested for assignment only when the Department has determined that the property is suitable and needed for educational purposes. The amount of real and related personal property to be transferred shall not exceed normal operating requirements of the applicant. Such property will not be requested for assignment unless it is needed at the time of application for educational purposes or will be so needed within the immediate or foreseeable future. Where construction or major renovation is not required or proposed, the property must be placed into use within twelve (12) months from the date of transfer. When construction or major renovation is contemplated at the time of transfer, the property must be placed in use within 36 months from the date of transfer. If the applicable time limitation is not met, the transferee shall either commence payments in cash to the Department for each month thereafter during which the proposed use has not been implemented or take such other action as set forth in § 12.12 as is deemed appropriate by the Department. Such monthly payments shall be computed on the basis of the current fair market value of the property at the time of the first payment by subtracting therefrom any portion of the purchase price paid in cash at the time of transfer, and by dividing the balance by the total number of months in the period of restriction. If the facility has not been placed into use within eight (8) years of the date of the deed, title to the property will be revested in the United States, or, at the discretion of the Department, the restrictions and conditions may be abrogated in accordance with § 12.9.

(d) Transfers will be made only after the applicant has certified that the proposed program is not in conflict with State or local zoning restrictions, building codes, or similar limitations.

(e) Organizations which may be eligible include those which provide elementary, secondary, post secondary, vocational, or specialized education, public library services, or similar programs which are primarily educational in character such as child development programs and adult education programs (including such programs for older Americans). Services which have as their principal purpose the providing of custodial or domiciliary care are not eligible. The property applied for must be for a purpose which the eligible organization is authorized to carry out.

(f) An applicant's plan of operation will not be approved unless it provides that the applicant will not discriminate because of race, color, sex, handicap, or national origin in the use of the property.

§ 12.4 Limitations.

(a) Surplus property transferred pursuant to this part will be disposed of on "as is, where is," basis without warranty of any kind.

(b) Unless excepted by the Administrator in his assignment, mineral rights will be conveyed together with the surface rights.

§ 12.5 Awards.

Where there is more than one applicant for the same property, it will be awarded to the applicant having a program of utilization which provides, in the opinion of the Department, the greatest public benefit. Where the property will serve more than one program, it will be apportioned to fit the needs of as many programs as is practicable.

§ 12.6 Notice of available property.

Reasonable publicity will be given to the availability of surplus real property which is suitable for assignment to the Department for transfer for educational uses. The Department will establish procedures reasonably calculated to afford all eligible users having a legitimate interest in acquiring the property for such uses an opportunity to make an application therefor. However, publicity need not be given to the availability of surplus real property which is occupied and being used for eligible educational purposes at the time the property is declared surplus, the occupant expresses interest in the property, and the Department determines that it has a continuing need therefor.

§ 12.7 Applications for surplus real property.

Applications for surplus real property for educational purposes shall be made to the Department in accordance with the notice of availability.

§ 12.8 Assignment of surplus real property.

(a) Notice of interest in a specific property for educational purposes will be furnished the Administrator by the Department at the earliest possible date.

(b) Requests to the Administrator for assignment of surplus real property to the Department for transfer for educational purposes will be based on the following conditions:

(1) The Department has an acceptable application for the property.

(2) The applicant is willing, authorized, and in a position to assume immediate care, custody, and maintenance of the property.

(3) The applicant is able, willing and authorized to pay the administrative expenses incident to the transfer.

(4) The applicant has the necessary funds, or the ability to obtain such funds, to carry out the approved program of use of the property.

§ 12.9 General disposal terms and conditions.

(a) Surplus real property transfers under this part will be limited to educational purposes. Transferees shall be entitled to a public benefit allowance in terms of a percentage which will be applied against the value of the property to be conveyed. Such an allowance will be computed on the basis of benefits to the United States from the use of such property for educational purposes. The computation of such public benefit allowances will be in accordance with Exhibits A and B attached hereto and made a part hereof.

(b) A transfer of surplus real property for educational purposes is subject to the disapproval of the Administrator within 30 days after notice is given to him of the proposed transfer.

(c) Transfers will be on the following terms and conditions:

(1) The transferee will be obligated to utilize the property continuously in accordance with an approved plan of operation.

(2) The transferee will not be permitted to sell, lease or sublease, rent, mortgage, encumber, or otherwise dispose of the property, or any part thereof, without the prior written authorization of the Department.

(3) The transferee will file with the Department such reports covering the utilization of the property as may be required.

(4) In the event the property is sold, leased or subleased, encumbered, disposed of, or is used for purposes other than those set forth in the approved plan without the consent of the Department, all revenues or the reasonable value of other benefits received by the transferee directly or indirectly from such use, as determined by the Department, will be considered to have been received and held in trust by the transferee for the account of the United States and will be subject to the direction and control of the Department. The provisions of this paragraph shall not impair or affect the rights reserved to the United States in paragraph (c)(6) of this section, or the right of the Department to impose conditions to its consent.

(5) Lessees will be required to carry all perils and liability insurance to protect the Government and the Government's residual interest in the property. Transferees will be required to carry such flood insurance as may be required by the Department pursuant to Pub. L. 93-234. Where the transferee elects to carry insurance against damages to or loss of on-site property due to fire or other hazards, and where loss or damage to transferred Federal surplus real property occurs, all proceeds from insurance shall be promptly used by the transferee for the purpose of repairing and restoring the property to its former condition, or replacing it with equivalent or more suitable facilities. If not so used, there shall be paid to the United States that

part of the insurance proceeds that is attributable to the Government's residual interest in the property lost, damaged, or destroyed, or, in the case of leases, attributable to the fair market value of the leased facilities.

(6) With respect to on-site property, in the event of noncompliance with any of the conditions of the transfer as determined by the department, title to the property transferred and the right to immediate possession shall, at the option of the Department, revert to the Government. In the event title is reverted to the United States for noncompliance or voluntarily reconveyed, the transferee shall, at the option of the Department, be required to reimburse the Government for the decrease in value of the property not due to reasonable wear and tear or acts of God or attributable to alterations completed by the transferee to adapt the property to the educational use for which the property was transferred. With respect to leased property, in the event of noncompliance with any of the conditions of the lease, as determined by the Department, the right of occupancy and possession shall, at the option of the Department, be terminated. In the event a leasehold is terminated by the United States for noncompliance or is voluntarily surrendered, the lessee shall be required at the option of the Department to reimburse the Government for the decrease in value of the property not due to reasonable wear and tear or acts of God or attributable to alterations completed by the lessee to adapt the property to the educational use for which the property was leased. With respect to any reverter of title or termination of leasehold resulting from noncompliance, the Government shall, in addition thereto, be reimbursed for such costs as may be incurred in recovering title to or possession of the property. Any payments of cash made by the transferee against the purchase price of property transferred shall, upon a forfeiture of title to the property for breach of condition, be forfeited.

(7) With respect to off-site property, in the event of noncompliance with any of the terms and conditions of the transfer, the unearned public benefit allowance shall, at the option of the Department, become immediately due and payable or, if the property or any portion thereof is sold, leased, or otherwise disposed of without authorization from the Department, such sale, lease or sublease, or other disposal shall be for the benefit and account of the United States and the United States shall be entitled to the proceeds. In the event the transferee fails to remove the property or any portion thereof within the time specified, then in addition to the rights reserved above, at the option of the Department, all right, title, and interest in and to such unremoved property shall be re-transferred to other eligible applicants or shall be forfeited to the United States.

(8) With respect only to on-site property which has been declared excess by the Department of Defense, such declaration having included a statement indicating the property has a known potential for use during a national emergency, the Department shall reserve the right during any period of emergency declared by the President of the Untied States or by the Congress of the United States to the full and unrestricted use by the Government of the surplus real property, or of any portion thereof, disposed of in accordance with the provisions of this part. Such use may be either exclusive or nonexclusive. Prior to the expiration or termination of the period of restricted use by the transferee, the Government will not be obligated to pay rent or any other fees or charges during the period of emergency, except that the Government will:

(i) Bear the entire cost of maintenance of such portion of the property used by it exclusively or over which it may have exclusive possession or control;

(ii) Pay the fair share, commensurate with the use of the cost of maintenance of such surplus real property as it may use nonexclusively or over which it may have nonexclusive possession or control;

(iii) Pay a fair rental for the use of improvements or additions to the surplus real property made by the purchaser or lessee without Government aid; and

(iv) Be responsible for any damage to the surplus real property caused by its use, reasonable wear and tear, the common enemy and acts of God excepted. Subsequent to the expiration or termination of the period of restricted use, the obligations of the Government will be as set forth in the preceding sentence and, in addition, the Government shall be obligated to pay a fair rental for all or any portion of the conveyed premises which it uses.

(9) The restrictions set forth in paragraphs (c) (1) through (7) of this section will extend for thirty (30) years for land with or without improvements; and for facilities being acquired separately from land whether they are for use on-site or off-site, the period of limitations on the use of the structures will be equal to their estimated economic life. The restrictions set forth in paragraphs (c) (1) through (7) of this section will extend for the entire initial lease period and for any renewal periods for property leased from the Department.

(d) Transferee, by obtaining the consent of the Department, may abrogate the restrictions set forth in paragraph (c) of this section for all or any portion of the property upon payment in cash to the Department of an amount equal to the then current fair market value of the property to be released, multiplied by the public benefit allowance granted at the time of conveyance, divided by the total number of months of the period of restriction set forth in the conveyance document and multiplied by the number of months that remain in the period of restriction as determined by the Department. For the purposes of abrogation payment computation, the current fair market value shall not include the value of any improvements placed on the property by the transferee.

(e) Related personal property will be transferred or leased as a part of the realty and in accordance with real property procedures. It will be subject to the same public benefit allowance granted for the real property. Where related personal property is involved in an on-site transfer, the related personal property may be transferred by a bill of sale imposing restrictions for a period not to exceed five years from the date of transfer, other terms and conditions to be the same as, and made a part of, the real property transaction.

§ 12.10 Compliance with the National Environmental Policy Act of 1969 and other related acts (environmental impact).

(a) The Department will, prior to making a final decision to convey or lease, or to amend, reform, or grant an approval or release with respect to a previous conveyance or lease of, surplus real property for educational purposes, complete an environmental assessment of the proposed transaction in keeping with applicable provisions of the National Environmental Policy Act of 1969, the National Historic Preservation Act of 1966, the National Archaeological Data Preservation Act, and other related acts. No permit to use surplus real property shall allow the permittee to make, or cause to be made, any irreversible change in the condition of said property, and no use permit shall be employed, for the purpose of delaying or avoiding compliance with the requirements of these Acts.

(b) Applicants shall be required to provide such information as the Department deems necessary to make an assessment of the impact of the proposed Federal action on the human environment. Materials contained in the applicant's official request, responses to a standard questionnaire prescribed by the Director of the Office of Federal Property Assistance, as well as other relevant information, will be used by the Department in making said assessment.

(c) If the assessment reveals (1) that the proposed Federal action involves properties of historical significance which are listed, or eligible for listing, in the National Register of Historic Places, or (2) that a more than insignificant impact on the human environment is reasonably foreseeable as a result of the proposed action, or (3) that the proposed Federal action could result in irreparable loss or destruction of archeologically significant items or data, the Department will, except as provided for in paragraph (d) of this section, prepare and distribute, or cause to be prepared or distributed, such notices and statements and obtain such approvals as are required by the above cited Acts.

(d) If a proposed action involves other Federal agencies in a sequence of actions, or a group of actions, directly related to each other because of their functional interdependence, the Department may enter into and support a lead agency agreement to designate a single lead agency which will assume primary responsibility for coordinating the assessment of environmental effects of proposed Federal actions, preparing and distributing such notices and statements, or obtaining such approvals, as are required by the above cited Acts. The procedures of the designated lead agency will be utilized in conducting the environmental assessment. In the event of disagreement between the Department and another Federal agency, the Department will reserve the right to abrogate its lead agency agreement with the other Federal agency.

§ 12.11 Special terms and conditions.

(a) Applicants will be required to pay all external administrative costs which will include, but not be limited to taxes, surveys, appraisals, inventory costs, legal fees, title search, certificate or abstract expenses, decontamination costs, moving costs, closing fees in connection with the transaction and service charges, if any, made by State Agencies for Federal Property Assistance under the terms of a cooperative agreement with the Department.

(b) In the case of off-site property, applicants will be required to post performance bonds, make performance guarantee deposits, or give such other assurances as may be required by the Department or the holding agency to insure adequate site clearance and to pay service charges, if any, made by State Agencies for Federal Property Assistance under the terms of a cooperative agreement with the Department.

(c) Whenever negotiations are undertaken for disposal to private nonprofit educational organizations of any surplus real property which cost the Government $1 million or more, the Department will give notice to the Attorney General of the United States of the proposed disposal and the terms and conditions thereof. The applicant shall furnish to the Department such information and documents as the Attorney General may determine to be appropriate or necessary to enable him to give the advice as provided for by section 207 of the Act.

(d) Where an applicant proposes to acquire or lease and use in place improvements located on land which the Government does not own, he shall be required, before the transfer is consummated, to obtain a right to use the land commensurate with the duration of the restrictions applicable to the improvements, or the term of the lease. The applicant will be required to assume, or obtain release of, the Government's obligations respecting the land including but not limited to obligations relating to restoration, waste, and rent. At the option of the Department, the applicant may be required to post a bond to indemnify the Government against such obligations.

(e) The Department may require the inclusion in the transfer or lease document of any other provision deemed desirable or necessary.

(f) Where an eligible applicant for an on-site transfer proposes to construct new, or rehabilitate old facilities, the financing of which must be accomplished through issuance of revenue bonds or other financing methods having terms inconsistent with the terms and conditions of transfer prescribed in § 12.9 (c), (d), and (e) the Department may, in its discretion, impose such alternate terms and conditions of transfer in lieu thereof as may be appropriate to assure utilization of the property for educational purposes.

§ 12.12 Utilization.

(a) Where property or any portion thereof is not being used for the purposes for which transferred, the transferee will be required at the direction of the Department:

(1) To place the property into immediate use for an approved purpose;

(2) To retransfer such property to such other educational user as the Department may direct;

(3) To sell such property for the benefit and account of the United States;

(4) To return title to such property to the United States or to relinquish any leasehold interest therein;

(5) To abrogate the conditions and restrictions of the transfer, as set forth in § 12.9(d), except that, where property has never been placed in use for the purposes for which transferred, abrogation will not be permitted except under extenuating circumstances; or

(6) To make payments as provided for in § 12.3(c).

(b) Where the transferee or lessee desires to place the property in temporary use for a purpose other than that for which the property was transferred or leased, approval from the Department must be obtained, and will be conditioned upon such terms as the Department may impose.

§ 12.13 Form of conveyance.

(a) Transfers or leases of surplus real property will be on forms approved by the Office of General Counsel of the Department and will include such of the disposal or lease terms and conditions set forth in this part and such other terms and conditions as may be appropriate or necessary.

(b) Transfers of on-site property will normally be by quitclaim deed without warranty of title.

§ 12.14 Compliance inspections and reports.

The Department will make or have made such compliance inspections as are necessary and will require of the transferee or lessee such compliance reports and actions as are deemed necessary.

§ 12.15 Reports to Congress.

The Secretary will make such reports of real property disposal activities as are required by section 203 of the Act and such other reports as may be required by law.

EXHIBIT A—PUBLIC BENEFIT ALLOWANCE FOR TRANSFER OF REAL PROPERTY FOR EDUCATIONAL PURPOSES [1]

Classification	Percent allowed													
	Basic public benefit allowance	Organization allowances								Utilization allowances				Maximum public benefit allowance
		Tax support	Accreditation	Federal impact	Public service training	Hardship	Inadequacy of existing school plant facilities			Introduction of new instructional programs	Student health and welfare	Research	Service to handicapped	
							10–25%	26–50%	51–100%					
Elementary and high schools	50	20	20	10	10	10	10	20	30	10	10	10	10	100
Colleges and universities	50	20	20		10	10	10	20	30	10	10	10	10	100
Specialized schools	50	20	20		10	10	10	20	30	10	10	10	10	100
Research and related activities	[2] 100													[2] 100
Public libraries and educational museums	[2] 100													[2] 100
School outdoor education	50	20	20							10	[3] 10			100
Central administrative and/or service centers	100 [4] 80													100 [4] 80

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[1] This public benefit allowance applies only to surplus real property being sold for on-site use. When surplus real property is to be moved from the site, a basic public benefit allowance of 100% will be granted.

[2] Applicable when this is the primary use to be made of the property. The public benefit allowance for the over-all program is applicable when such facilities are conveyed as a minor component of other facilities.

[3] This 10% may include recognition of an approvable recreation program operated in such a way as to be accessible to the public yet entirely compatible with, but subordinate to, the educational program.

[4] The maximum allowance available to eligible private, non-profit institutions. Tax-supported institutions receive 100% allowance.

PART 15—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION FOR FEDERAL AND FEDERALLY ASSISTED PROGRAMS

AUTHORITY: Section 213, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91-646, 84 Stat. 1894 (42 U.S.C. 4601) as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Title IV of Pub. L. 100-17, 101 Stat. 246-256 (42 U.S.C. 4601 note).

§ 15.1 Uniform relocation assistance and real property acquisition.

Regulations and procedures for complying with the Uniform Relocation Assistance Act of 1970 (Pub. L. 91-646, 84 Stat. 1894, 42 U.S.C. 4601) as amended by the SUrface Transportation and Uniform Relocation Assistance Act of 1987 (Title IV of Pub. L. 100-17, 101 Stat. 264-255, 42 U.S.C. 4601 note) are set forth in 49 CFR Part 24.

[52 FR 48021, Dec. 17, 1987 and 54 FR 8912 and 8913, Mar. 2, 1989]

PART 19—NATIONAL SECURITY INFORMATION PROCEDURES

Subpart A—Who Is Responsible for Oversight of National Security Information Procedures?

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19.11 Safeguarding information.
19.12 Reproduction controls.
19.13 Storage.
19.14 Mandatory review for declassification.
19.15 Employee education.

AUTHORITY: Executive Order 12356.

SOURCE: 46 FR 48927, Oct. 5, 1981, unless otherwise noted.

Subpart A—Who Is Responsible for Oversight of National Security Information Procedures?

§ 19.1 Responsibility for oversight.

The Office of Inspector General is responsible for conducting an oversight program that will ensure effective implementation of Executive Order (EO) 12356. Specifically the Assistant Inspector General for Investigation will ensure that the oversight program provides for:

(a) Issuing departmental directives ensuring that classified information is processed, used, reproduced, stored, destroyed, and transmitted only under conditions that provide adequate protection and prevent unauthorized persons from gaining access.

(b) Directing Department-wide security training and educational programs in personnel security and document security.

(c) Recommending administrative action to correct violations of any provisions of these regulations, including notification by warning letters, formal reprimand, and, to the extent permitted by law, suspension without pay and removal.

(d) Receiving questions, suggestions, and complaints regarding all elements of this program.

(e) Designating the Office of Inspector General as having sole responsibility for changes to the program and for assuring that the program is consistent with EO 12356.

(f) Designating the Department's official contact for declassification requests submitted under provisions of EO 12356, the Freedom of Information Act (5 U.S.C. 552), and the Privacy Act of 1974 (5 U.S.C. 552a).

[46 FR 48927, Oct. 5, 1981, as amended at 50 FR 28102, July 10, 1985]

Subpart B—What Procedures Are Used for Handling National Security Information?

§ 19.11 Safeguarding information.

(a) All classified data that is marked "Top Secret," "Secret," and "Confidential" under the terms of EO 12356 will be delivered immediately upon receipt to the Assistant Inspector General for Investigation or designees.

(b) The Assistant Inspector General for Investigation or designees informs departmental recipients of classified data of current designees and alternate offices to which the data referred to in paragraph (a) of this section is to be delivered.

(c) Access to classified material is restricted to those individuals with an authorized security clearance and a need to know.

[46 FR 48927, Oct. 5, 1981, as amended at 50 FR 28102, July 10, 1985]

§ 19.12 Reproduction controls.

(a) Reproduction of classified material within the Department of Education must be in compliance with Executive Order 12356, Section 4-1.

(b) If copies of data are reproduced, the same controls imposed on the original document will apply to the reproductions.

(c) The Assistant Inspector General for Investigation or designees will maintain:

(1) Records showing the number and distribution of copies; and

(2) A log stored with the original documents.

[46 FR 48927, Oct. 5, 1981, as amended at 50 FR 28102, July 10, 1985]

§ 19.13 Storage.

(a) All classified documents must be stored in security containers approved by the General Services Administration and located in the Office of Inspector General's security office or other approved area.

(b) If access to the security container is controlled by a combination lock:

(1) The combination must be changed as required by the June 25, 1982 Information Security Oversight Office's (ISOO) Directive No. 1, Section 2001.43.

(2) Only the Assistant Inspector General for Investigation or designees who hold proper security clearances shall know the combination; and

(3) The combination must be afforded the same classification as the material stored within the security container.

[46 FR 48927, Oct. 5, 1981, as amended at 50 FR 28102, July 10, 1985]

§ 19.14 Mandatory review for declassification.

(a) *Requests.* Request for mandatory review of national security information must be in writing and addressed to the Assistant Inspector General for Investigation, Office of Inspector General, U.S. Department of Education, L'Enfant Plaza Station, P.O. Box 23458, Washington, D.C. 20026.

(b) *Mandatory review.* Information is subject to mandatory review by the originating agency if:

(1) The request is made by a U.S. citizen or permanent resident alien, a Federal agency, or a State or local government; and

(2) The request describes the document or material containing the information with sufficient specificity to enable the Department to locate it with a reasonable amount of effort.

(c) *Exemptions from mandatory review.* Information originated by a President, the White House staff, by committees, commissions, or boards appointed by the President, or others specifically providing advice and counsel to a President or acting on behalf of a President, is exempted from mandatory review for declassification.

(d) *Processing requirements.* The Department of Education does not have original classification authority. Any classified information or materials in its custody are classified by another agency. The Department refers copies of the request and the requested documents to the originating agency for processing, and may, after consultation with the originating agency, inform the requester of the referral.

(e) *Fees.* The Department may charge fees for search and review time required to process the request and for reproduction costs. These fees are charged in accordance with 31 U.S.C. 483a.

[50 FR 28102, July 10, 1985]

§ 19.15 Employee education.

(a) The employee education program concerning document security must be provided to every Department of Education employee who has or may require access to classified material in the performance of his or her duties and who possesses the appropriate security clearance.

(b) Each employee having an access clearance is briefed by the Assistant Inspector General for Investigation or designees concerning personal responsibilities for classified material under EO 12356 and appropriate ISOO directives.

(c) Each employee who receives a briefing shall sign a statement to certify that the briefing was accomplished.

[46 FR 48927, Oct. 5, 1981, as amended at 50 FR 28102, July 10, 1985]

PART 21—EQUAL ACCESS TO JUSTICE

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AUTHORITY: Equal Access to Justice Act (Title II of Pub. L. 96-481), 94 Stat. 2325 (5 U.S.C. 504), unless otherwise noted.

SOURCE: 49 FR 31869, Aug. 9, 1984, unles otherwise noted.

Subpart A—General

§ 21.1 Equal Access to Justice Act.

(a) The Equal Access to Justice Act (the Act) provides for the award of fees and other expenses to applicants that:

(1) Are prevailing parties in adversary adjudications before the Department of Education; and

(2) Meet all other conditions of eligibility contained in this part.

(b) An eligible applicant, as described in paragraph (a) of this section, is entitled to receive an award unless:

(1) The adjudicative officer—or the Secretary, on review—determines that:

(i) The Department's position in the proceeding was substantially justified; or

(ii) Special circumstances make an award unjust; or

(2) The adversary adjudication is under judicial review, in which case the applicant may receive an award only as described in § 21.11.

(Authority: 5 U.S.C. 504 (a)(1) and (c)(1))

§ 21.2 Time period when the Act applies.

(a) The Act applies to any adversary adjudication covered under this part and pending before the Department at any time between October 1, 1981 and September 30, 1984.

(b) The adversary adjudications referred to in paragraph (a) of this section include:

(1) Proceedings begun before October 1, 1981 if final departmental action has not been taken before that date; and

(2) Proceedings pending on September 30, 1984 regardless of when they were initiated or when final department action occurs.

(Authority: 5 U.S.C. 504(d)(2))

§ 21.3 Definitions.

The following definitions apply to this part:

"Act" means the Equal Access to Justice Act.

"Adjudicative officer" means the deciding official who presided at the adversary adjuidication.

(Authority: 5 U.S.C. 504(b)(1)(D))

"Adversary adjudication" means a proceeding:

(a) Conducted by the Department for the formulation of an order arising from a hearing on the record under the Administrative Procedure Act (5 U.S.C. 554),

(b) Listed in § 21.10; and

(c) In which the position of the Department was represented by counsel or by another representative.

(Authority: 5 U.S.C. 504(b)(C))

"Department" means the U.S. Department of Education.

"Employee."

(a) This term means a person who regularly performs for an applicant services:

(1) For remuneration; and

(2) Under the applicant's direction and control.

(b) The term also includes, on a proportional basis, a part-time or seasonal employee who meets the conditions of paragraph (a) of this definition.

(Authority: 5 U.S.C. 504(c)(1))

"Fees and other expenses" means an eligible applicant's reasonable fees and expenses:

(a) Related to the issues on which it was the prevailing party in the adversary adjudication; and

(b) Further described in §§ 21.33 and 21.50.

"Party" means a "person" or a "party" as those terms are defined in the Administrative Procedure Act (5 U.S.C. 551 (2) and (3)); that is, an individual, partnership, corporation, association, or public or private organization. The term does not include an agency of the Federal Government.

(Authority: 5 U.S.C. 504(b)(1)(B))

"Secretary" means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

(Authority: 5 U.S.C. 504 (b)(1) and (c)(1))

Subpart B—Which Adversary Adjudications Are Covered?

§ 21.10 Adversary adjudications covered by the Act.

The Act covers adversary adjudications under section 554 of Title 5 of the United States Code. These include the following:

(a) Proceedings to:

(1) Limit, suspend, or terminate the participation of institutions of higher education in student assistance programs authorized by Title IV of the Higher Education Act; or

(2) Impose a civil penalty on those types of institutions. (20 U.S.C. 1094(b)(1)(D) and (2))

(b) Compliance proceedings under Title VI of the Civil Rights Act of 1964. (42 U.S.C. 2000d *et seq.*)

(c) Compliance and enforcement proceedings under the Age Discrimination Act of 1975. (42 U.S.C. 6101 *et seq.*)

(d) Compliance proceedings under Title IX of the Education Amendments of 1972. (20 U.S.C. 1681 *et seq.*)

(e) Compliance proceedings under section 504 of the Rehabilitation Act of 1973, as amended. (29 U.S.C. 794)

(f) Witholding proceedings under section 592 of the Education Consolidation and Improvement Act of 1981. (20 U.S.C. 3872)

(g) Proceedings under:

(1) Section 5(g) of Pub. L. 81-874, as amended (Financial Assistance for Local Education Agencies in Areas Affected by Federal Activity). (20 U.S.C. 240(g)); or

(2) Section 6(c) of 11(a) of Pub. L. 81-815, as amended (An Act relating to the construction of school facilities in areas affected by Federal activities, and for other purposes). (20 U.S.C. 636(c) or 641(a))

(h) Other adversary adjudications that fall within the coverage of the Act.

(Authority: 5 U.S.C. 504(c)(1))

§ 21.11 Effect of judicial review of adversary adjudication.

If a court reviews the underlying decision of an adversary adjudication covered under this part, an award of fees and other expenses may be made only under section 204 of the Act (awards in certain judicial proceedings).

(Authority: 5 U.S.C. 504(c)(1); 28 U.S.C. 2412(d)(3))

Subpart C—How is Eligibility Determined?

§ 21.20 Types of eligible applicants.

The following types of parties that prevail in adversary adjudications are eligible to apply under the Act for an award of fees and other expenses:

(a) An individual who has a net worth of not more than $1 million.

(b) A sole owner of an unincorporated business who has:

(1) A net worth of not more than $5 million, including both personal and business interests; and

(2) Not more than 500 employees.

(c) A charitable or other tax-exempt organization:

(1) As described in section 501(c)(3) of the Internal Revenue Code; and

(2) Having not more than 500 employees.

(d) A cooperative association:

(1) As defined in section 15(a) of the Agricultural Marketing Act; and

(2) Having not more than 500 employees.

(e) Any other partnership, corporation, association, or public or private organization that has:

(1) A net worth of not more than $5 million; and

(2) Not more than 500 employees.

(Authority: 5 U.S.C. 504(b)(1)(B))

§ 21.21 Determination of net worth and number of employees.

(a) The adjudicative officer determines an applicant's net worth and number of employees as of the date the adversary adjudication was initiated.

(b) In determining eligibility, the adjudicative officer includes the net worth and number of employees of the applicant and all of the affiliates of the applicant.

(c) For the purposes of paragraph (b) of this section, the adjudicative officer considers as an affiliate:

(1) Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant;

(2) Any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest and

(3) Any entity with a financial relationship to the applicant that, in the determination of the adjudicative officer, constitutes an affiliation for the purposes of paragraph (b) of this section.

(Authority: 5 U.S.C. 504(c)(1))

§ 21.22 Applicants representing others.

If an applicant is a party in an adversary adjudication primarily on behalf of one or more persons or entities that are ineligible under this part, the applicant is not eligible for an award.

(Authority: 5 U.S.C. 504 (b)(1)(B) and (c)(1))

Subpart D—How Does One Apply for an Award?

§ 21.30 Time for filing application.

(a) In order to be considered for an award under this part, an applicant may file its application when it prevails in an adversary adjudication—or in a significant and discrete substantive portion of an adversary adjudication—but no later than 30 days after the Department's final disposition of the adversary adjudication.

(b) In the case of a review or reconsideration of a decision in which an applicant has prevailed or believes it has prevailed, the adjudicative officer stays proceedings on the application pending final disposition of the adversary adjudication.

(c) For purposes of this part, final disposition of the adversary adjudication means the latest of:

(1) The date on which an initial decision or other recommended disposition of the merits of the proceeding by an adjudicative officer becomes administratively final;

(2) The date of an order disposing of any petitions for reconsideration of the final order in the adversary adjudication;

(3) If no petition for reconsideration is filed, the last date on which that type of petition could have been filed; or

(4) The date of a final order or any other final resolution of a proceeding—such as a settlement or voluntary dismissal—that is not subject to a petition for reconsideration.

(Authority: 5 U.S.C. 504 (a)(2) and (c)(1))

§ 21.31 Contents of application.

(a) In its application for an award of fees and other expenses, an applicant shall include the following:

(1) Information adequate to show that the applicant is a prevailing party in an adversary adjudication or in a significant and discrete substantive portion of an adversary adjudication.

(2) A statement that the adversary adjudication is covered by the Act according to § 21.10.

(3) An allegation that the position of the Department in the adversary adjudication was not substantially justified, including a description of the specific position.

(4)(i) Information adequate to show that the applicant qualifies under the requirements of §§ 21.20 and 21.21 regarding net worth and number of employees.

(ii) If applicable, this information shall include a detailed exhibit of the net worth of the applicant—and its affiliates as described in § 21.21—as of the date the proceeding was initiated.

(iii) However, the net worth requirements do not apply to a qualified tax-exempt organization or a qualified agricultural cooperative association.

(5)(i) The total amount of fees and expenses sought in the award; and

(ii) An itemized statement of:

(A) Each expense; and

(B) Each fee, including the actual time expended for this fee and the rate at which the fee was computed.

(6) A written verification under oath or affirmation or under penalty of perjury from each attorney representing the applicant stating:

(i) The rate at which the fee submitted by the attorney was computed; and

(ii) The actual time expended for the fee.

(7) A written verification under oath or affirmation or under penalty of perjury that the information contained in the application and any accompanying material is true and complete to the best of the applicant's information and belief.

(b) The adjudicative officer may require the applicant to submit additional information.

(Authority: 5 U.S.C. 504 (a)(2) and (c)(1))

§ 21.32 Confidentiality of information about net worth.

(a) In a preceeding on an application, the public record ordinarily includes the information showing the net worth of the applicant.

(b) However, if an applicant objects to public disclosure of any portion of the information and believes there are legal grounds for withholding it from disclosure, the applicant may submit directly to the adjudicative officer:

(1) The information the applicant wishes withheld, in a sealed envelope labeled "Confidential Financial Information"; and

(2) A motion to withhold the information from public disclosure.

(c) The motion must:

(1) Describe the information the applicant is requesting be withheld; and

(2) Explain in detail:

(i) Why that information falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act;

(ii) Why public disclosure of the information would adversely affect the applicant; and

(iii) Why disclosure is not required in the public interest.

(d)(1) The applicant shall serve on counsel representing the Department a copy of the material referred to in paragraph (c) of this section.

(2) The applicant is not required to give a copy of that material to any other party to the proceeding.

(e)(1) If the adjudicative officer finds that the information should not be withheld from public disclosure, the information is placed in the public record of the proceeding.

(2) If the adjudicative officer finds that the information should be withheld from public disclosure, any request to inspect or copy the information is treated in accordance with the Department's established procedures under the Freedom of Information Act (34 CFR Part 5).

(Authority: 5 U.S.C. 504(c)(1))

§ 21.33 Allowable fees and expenses.

(a) A prevailing party may apply for an award of fees and other expenses incurred by that party in connection with:

(1) An adversary adjudication; or

(2) A significant and discrete substantive portion of an adversary adjudication.

(b) If a proceeding includes issues covered by the Act and issues excluded from coverage, the applicant may apply only for an award of fees and other expenses related to covered issues.

(c) Allowable fees and expenses include the following, as applicable:

(1) An award of fees based on rates customarily charged by attorneys, agents, and expert witnesses.

(2) An award for the reasonable expenses of the attorney, agent, or expert witness as a separate item if the attorney, agent, or expert witness ordinarily charges clients separately for those expenses.

(3) The cost of any study, analysis, report, test, or project related to the preparation of the applicant's case in the adversary adjudication.

(Authority: 5 U.S.C. 504 (a)(1), (b)(1)(A), and (c)(1))

Subpart E—What Procedures Ar Used in Considering Applications

§ 21.40 Filing and service of documents.

Except as provided in § 21.32, an plicant shall:

(a) File with the adjudicative offi its application and any related do ments; and

(b) Serve on all parties to the adv sary adjudication copies of its appli tion and any related documents.

(Authority: 5 U.S.C. 504 (a)(2) and (c)(1))

§ 21.41 Answer to application.

(a)(1) Within 30 days after receivi an application for an award under t part, the Department's counsel m file an answer to the application.

(2) The Department's counsel m request an extension of time for fili the Department's answer.

(3) The adjudicative officer m grant the request for an extension the Department's counsel shows go cause for the request.

(b)(1) The Department's answ must:

(i) Explain any objections to t award requested; and

(ii) Identify the facts relied on support of the Department's positi

(2) If the answer is based on any leged facts not in the record of the versary adjudication, the Depa ment's counsel shall include with t answer either:

(i) Supporting affidavits; or

(ii) A request for further proce ings under § 21.44.

(c)(1) If the Department's coun and the applicant believe that t issues in the application can be s tled, they may jointly file a stateme of their intent to negotiate a sett ment.

(2)(i) The filing of the statement tends for 30 days the time for filing answer.

(ii) The adjudicative officer m grant further extensions if the D partment's counsel and the applica jointly request those extensions.

(Authority: 5 U.S.C. 504 (a) and (c)(1))

§ 21.42 Reply.

(a) Within 15 days after receiving an answer, an applicant may file a reply.

(b) If the applicant's reply is based on any alleged facts not in the record of the adversary adjudication, the applicant shall include with the reply either:

(1) Supporting affidavits; or

(2) A request for further proceedings under § 21.44.

(Authority: 5 U.S.C. 504(c)(1))

§ 21.43 Comments by other parties.

(a) Any party to a proceeding, other than an applicant or the Department's counsel, may file comments on:

(1) The application within 30 days after the applicant files the application;

(2) The answer within 30 days after the counsel files the answer; or

(3) Both, each within the times specified respectively in paragraphs (a) (1) and (2) of this section.

(b) The commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that further participation is necessary to permit full exploration of matters raised in the comments.

(Authority: 5 U.S.C. 504(c)(1))

§ 21.44 Further proceedings.

(a) The adjudicative officer ordinarily makes the determination of an award on the basis of the written record.

(b)(1) However, the adjudicative officer may order further proceedings if he or she determines that those proceedings are necessary for full and fair resolution of issues arising from the application.

(2) If further proceedings are ordered, the adjudicative officer determines the scope of those proceedings.

(c) If the applicant or the Department's counsel requests the adjudicative officer to order further proceedings, the request must:

(1) Specify the information sought or the disputed issues; and

(2) Explain why the additional proceedings are necessary to obtain that information or resolve those issues.

(Authority: 5 U.S.C. 504 (a)(3) and (c)(1))

Subpart F—How Are Awards Determined?

§ 21.50 Standards for awards.

(a) In determining the reasonableness of the amount sought as an award of fees and expenses for an attorney, agent, or expert witness, the adjudicative officer may consider one or more of the following:

(1)(i) If the attorney, agent, or expert witness is in private practice, his or her customary fee for similar services; or

(ii) If the attorney, agent, or expert witness is an employee of the applicant, the fully allocated cost of the services.

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services.

(3) The time the attorney, agent, or expert witness actually spent on the applicant's behalf with respect to the adversary adjudication.

(4) The time the attorney, agent, or expert witness reasonably spent in light of the difficulty or complexity of the covered issues in the adversary adjudication.

(5) Any other factors that may bear on the value of the services provided by the attorney, agent, or expert witness.

(b) The adjudicative officer does not grant:

(1) An award for the fee of an attorney or agent in excess of $75.00 per hour; or

(2) An award to compensate an expert witness in excess of the highest rate at which the Department pays expert witnesses.

(c) The adjudicative officer may also determine whether:

(1) Any study, analysis, report, text, or project for which the applicant seeks an award was necessary for the preparation of the applicant's case in the adversary adjudication; and

(2) The costs claimed by the applicant for this item or items are reasonable.

(d) The adjudicative officer does not make an award to an eligible party if the adjudicative officer, or the Secretary on review, finds that:

(1) The Department's position wasd substantially justified; or

(2) Special circumstances make an award unjust.

(e) The adjudicative officer may reduce or deny an award to the extent that the applicant engaged in conduct that unduly or unreasonably protracted the adversary adjudication.

(Authority: 5 U.S.C. 504(a))

§ 21.51 Initial decision.

(a) The adjudicative officer issues an initial decision on an application within 30 days after completion of proceedings on the application.

(b) The initial decision includes the following:

(1) Written findings, including sufficient supporting explanation, on:

(i) The applicant's status as a prevailing party;

(ii) The applicant's eligibility;

(iii) Whether the Department's position in the adversary adjudication was substantially justified;

(iv) Whether special circumstances make an award unjust;

(v) If applicable, whether the applicant engaged in conduct that unduly or unreasonably protracted the adversary adjudication; and

(vi) Other factual issues raised in the adversary adjudication.

(2)(i) A statement of the amount awarded, including an explanation—with supporting information—for any difference between the amount requested by the applicant and the amount awarded.

(ii) The explanation referred to in paragraph (b)(2)(i) of this section may include:

(A) Whether the amount requested was reasonable; and

(B) The extent to which the applicant unduly or unreasonably protracted the adversary adjudication.

(3) A statement of the applicant's right to request review by the Secretary under § 21.52

(4) A statement of the applicant's right under § 21.45 to seek judicial review of the final award determination.

(Authority: 5 U.S.C. 504(a)(3) and (c)(1))

§ 21.52 Review by the Secretary.

(a) The Secretary may decide
review the adjudicative officer's init
decision.

(b) If the applicant or the Depa
ment's counsel seeks a review, the
quest must be submitted to the Sec
tary, in writing, within 30 days aft
the initial decision is issued.

(c) If the Secretary decides to revi
the initial decision:

(1) The Secretary acts on the revi
within 30 days of accepting the init
decision for review;

(2) The Secretary reviews the init
decision on the basis of the writt
record of the proceedings on the app
cation. This includes but is not
stricted to:

(i) The written request; and

(ii) The adjudicative officer's fin
ings as described in § 21.51(b); and

(3) The Secretary either:

(i) Issues a final decision on the
plication; or

(ii) Remands the application to t
adjudicative officer for further p
ceedings.

(d) If the Secretary issues a final
cision on the application, the Sec
tary's decision:

(1) Is in writing:

(2) States the reasons for the de
sion; and

(3) If the decision is adverse to t
applicant, advises the applicant of
right to petition for judicial revi
under § 21.54.

(Authority: 5 U.S.C. 557 (b) and (c))

§ 21.53 Final decision if the Secret does not review.

If the Secretary takes no acti
under § 21.52, the adjudicative of
cer's initial decision on the applicati
becomes the Secretary's final decisi
30 days after it is issued by the adju
cative officer.

(Authority: 5 U.S.C. 557(b))

§ 21.54 Judicial review.

If an applicant is dissatisfied wi
the award determination in the fin
decision under § 21.52 or § 21.53, t
applicant may seek judicial review
that determination under 5 U.S.
504(c)(2).

(Authority: 5 U.S.C. 504(c)(2))

Subpart G—How Are Awards Paid?

§ 21.60 Payment of awards.

To receive payment, an applicant granted an award under the Act must submit to the Finance Office of the Department:

(a) A request for payment signed by the applicant or its duly authorized agent;

(b) A copy of the final decision granting the award; and

(c) A statement that:

(1) The applicant will not seek review of the decision in the United States courts; or

(2) The process for seeking review of the award has been completed.

(Authority: 5 U.S.C. 504(c)(1))

§ 21.61 Release.

If an applicant, its agent, or its attorney accepts payment of any award or settlement in conjunction with an application under this part, that acceptance:

(a) Is final and conclusive with respect to that application; and

(b) Constitutes a complete release of any further claim against the United States with respect to that application.

(Authority: 5 U.S.C. 504(c)(1))

PART 30—DEBT COLLECTION

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30.60 What costs does the Secretary impose on delinquent debtors?
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Subpart G—[Reserved]

AUTHORITY: 20 U.S.C. 1221e-3(a)(1), and 1226a-1, 31 U.S.C. 3711(e), 31 U.S.C. 3716(b) and 3720A, unless otherwise noted.

SOURCE: 51 FR 24099, July 1, 1986, unless otherwise noted.

Subpart A—General

§ 30.1 What administrative actions may the Secretary take to collect a debt?

(a) The Secretary may take one or more of the following actions to collect a debt owed to the United States:

(1) Collect the debt under the procedures authorized in the regulations in this part.

(2) Refer the debt to the General Accounting Office for collection.

(3) Refer the debt to the Department of Justice for compromise, collection, or litigation.

(4) Take any other action authorized by law.

(b) In taking any of the actions listed in paragraph (a) of this section, the Secretary complies with the requirements of the Federal Claims Collection Standards (FCCS) at 4 CFR Parts 101-105 that are not inconsistent with the requirements of this part.

(c) The Secretary may—

(1) Collect the debt under the offset procedures in Subpart C of this part;

(2) Report a debt to a consumer reporting agency under the procedures in Subpart C of this part;

(3) Charge interest on the debt as provided in the FCCS;

(4) Impose upon a debtor a charge based on the costs of collection as determined under Subpart E of this part;

(5) Impose upon a debtor a penalty for failure to pay a debt when due under Subpart E of this part;

(6) Compromise a debt, or suspend or terminate collection of a debt, under Subpart F of this part;

(7) Take any other actions under the procedures of the FCCS in order to protect the United States Government's interests; or

(8) Use any combination of the procedures listed in this paragraph (c) as may be appropriate in a particular case.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3711(e))

[53 FR 33425, Aug. 30, 1988]

§ 30.2 On what authority does the Secretary rely to collect a debt under this part?

(a)(1) The Secretary takes an action referred to under § 30.1(a) in accordance with—

(i) 31 U.S.C. Chapter 37, Subchapters I and II;

(ii) Other applicable statutory authority; or

(iii) The common law.

(2) If collection of a debt in a particular case is not authorized under one of the authorities described in paragraph (a)(1) of this section, the Secretary may collect the debt under any other available authority under which collection is authorized.

(b) The Secretary does not use a procedure listed in § 30.1(c) to collect a debt, or a certain type of debt, if—

(1) The procedure is specifically prohibited under a Federal statute; or

(2) A separate procedure other than the procedure described under § 30.1(c) is specifically required under—

(i) A contract, grant, or other agreement;

(ii) A statute other than 31 U.S.C. 3716; or

(iii) Other regulations.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3711(e))

[53 FR 33425, Aug. 30, 1988]

Subpart B—[Reserved]

Subpart C—What Provisions Apply to Administrative Offset?

GENERAL OFFSET PROCEDURES

§ 30.20 To what do §§ 30.20–30.31 apply?

(a)(1)(i) Sections 30.20–30.31 establish the general procedures used by the Secretary to collect debts by administrative offset.

(ii) The Secretary uses the procedures established under other regulations, including § 30.33, What procedures does the Secretary follow for IRS tax refund offsets?, 34 CFR Part 31, Salary Offset for Federal Employees Who Are Indebted to the United States Under Programs Administrated by the Secretary of Education, and 34

CFR Part 32, Salary Offset to Recover Overpayments of Pay or Allowances from Department of Education Employees, if the conditions requiring application of those special procedures exists.

(2) The word "offset" is used in this subpart to refer to the collection of a debt by administrative offset.

(b) The Secretary does not rely on 31 U.S.C. 3716 as authority for offset if:

(1) The debt is owed by a State or local government;

(2) The debt, or the payment against which offset would be taken, arises under the Social Security Act;

(3) The debt is owed under:

(i) The Internal Revenue Code of 1954; or

(ii) The tariff laws of the United States; or

(4) The right to collect the debt first accrued more than ten years before initiation of the offset.

(c)(1) The Secretary may rely on 31 U.S.C. 3716 as authority for offset of a debt to which paragraph (b)(4) of this section would otherwise apply if facts material to the Government's right to collect the debt were not known and could not reasonably have been known by the official or officials of the Government who are charged with the responsibility to discover and collect the debt.

(2) If paragraph (c)(1) of this section applies, the Secretary may rely on 31 U.S.C. 3716 as authority for offset up to 10 years after the date that the official or officials described in that paragraph first knew or reasonably should have known of the right of the United States to collect the debt.

(d) The Secretary determines when the right to collect a debt first accrued under the existing law regarding accrual of debts such as 28 U.S.C. 2415.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

[51 FR 24099, July 1, 1986, as amended at 51 FR 35646, Oct. 7, 1986; 53 FR 33425, Aug. 30, 1988; 54 FR 43583, Oct. 26, 1989]

§ 30.21 When may the Secretary offset a debt?

(a) The Secretary may offset a debt if:

(1) The debt is liquidated or certain in amount; and

(2) Offset is feasible and not otherwise prohibited.

(b) (1) Whether offset is feasible is determined by the Secretary in the exercise of sound discretion on a case-by-case basis, either:

(i) For each individual debt or offset; or

(ii) For each class of similar debts or offsets.

(2) The Secretary considers the following factors in making this determination:

(i) Whether offset can be practically and legally accomplished.

(ii) Whether offset will further and protect the interests of the United States.

(c) The Secretary may switch advance funded grantees to a reimbursement payment system before initiating an offset.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

§ 30.22 What notice does the debtor receive before the commencement of offset?

(a)(1) Except as provided in §§ 30.28 and 30.29, the Secretary provides a debtor with written notice of the Secretary's intent to offset before initiating the offset.

(2) The Secretary mails the notice to the debtor at the current address of the debtor, as determined by the Secretary from information regarding the debt maintained by the Department.

(b) The written notice informs the debtor regarding:

(1) The nature and amount of the debt;

(2) The Secretary's intent to collect the debt by offset;

(3) The debtor's opportunity to:

(i) Inspect and copy Department records pertaining to the debt;

(ii) Obtain a review within the Department of the existence or amount of the debt; and

(iii) Enter into a written agreement with the Secretary to repay the debt;

(4) The date by which the debtor must request an opportunity set forth under paragraph (b)(3) of this section; and

(5) The Secretary's decision, in appropriate cases, to switch the debtor from advance funding to a reimbursement payment system.

(c)(1) In determining whether a debtor has requested an opportunity set forth under paragraph (b)(3) of this section in a timely manner, the Secretary relies on:

(i) A legibly dated U.S. Postal Service postmark for the debtor's request; or

(ii) a legibly stamped U.S. Postal service mail receipt for debtor's request.

(2) The Secretary does not rely on either of the following as proof of mailing;

(i) A private metered postmark.

(ii) A mail receipt that is not dated by the U.S. Postal Service.

NOTE.—The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method for proof of mailing, a debtor should check with its local post office.

(d) If a debtor previously has been notified of the Secretary's intent to offset or offered an opportunity to take any of the actions set forth in paragraph (b)(3) of this section in connection with the same debt, the Secretary may offset without providing the debtor with an additional notice of intent or opportunity to take any of those actions under these offset procedures.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

§ 30.23 How must a debtor request an opportunity to inspect and copy records relating to a debt?

(a) If a debtor wants to inspect and copy Department documents relating to the debt, the debtor must:

(1) File a written request to inspect and copy the documents within 20 days after the date of the notice provided under § 30.22; and

(2) File the request at the address specified in that notice.

(b) A request filed under paragraph (a) of this section must contain:

(1) All information provided to the debtor in the notice under § 30.22 or § 30.33(b) that identifies the debtor and the debt, including the debtor's Social Security number and the program under which the debt arose, together with any corrections of that identifying information; and

(2) A reasonably specific identification of the records the debtor wishes to have available for inspection and copying.

(c) The Secretary may decline to provide an opportunity to inspect and copy records if the debtor fails to request inspection and copying in accordance with this section.

(Approved by the Office of Management and Budget under control number 1880-0515)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

[51 FR 24099, July 1, 1986, as amended at 51 FR 35646, Oct. 7, 1986]

§ 30.24 What opportunity does the debtor receive to obtain a review of the existence or amount of a debt?

(a) If a debtor wants a review within the Department of the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii), the debtor must:

(1) File a request for review within 20 days after the date of the notice provided under § 30.22; and

(2) File a request at the address specified in that notice.

(b) A request filed under paragraph (a) of this section must contain:

(1) All information provided to the debtor in the notice under § 30.22 or § 30.33(b) that identifies the debtor and the particular debt, including the debtor's Social Security number and the program under which the debt arose, together with any corrections of that identifying information; and

(2) An explanation of the reasons the debtor believes that the notice the debtor received under § 30.22 or § 30.33(b) inaccurately states any facts or conclusions relating to the debt.

(c) The Secretary may decline to provide an opportunity for review of a debt if the debtor fails to request the review in accordance with this section.

(d)(1) The debtor shall:

(i) File copies of any documents relating to the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii) that the debtor wishes the Secretary to consider in the review;

(ii) File the documents at the address specified in that notice, and

(iii) File the documents no later than:

(A) 20 days after the date of the notice provided under § 30.22; or

(B) If the debtor has requested an opportunity to inspect and copy records under § 30.23 within the time period specified in that section, 15 days after the date on which the Secretary makes available to the debtor the relevant, requested records.

(2) The Secretary may decline to consider any reasons or documents that the debtor fails to provide in accordance with paragraphs (b) and (d) of this section.

(e) If the Secretary bases the review on only the documentary evidence, the Secretary:

(1) Reviews the documents submitted by the debtor and other relevant evidence; and

(2) Notifies the debtor in writing of the Secretary's decision regarding the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii) and, if appropriate, the question of waiver of the debt.

(Approved by the Office of Management and Budget under control number 1880-0515)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

[51 FR 24099, July 1, 1986, as amended at 51 FR 35647, Oct. 7, 1986]

§ 30.25 How may a debtor obtain an oral hearing?

(a) If a debtor wants the Secretary to conduct the review requested under § 30.24 as an oral hearing, the debtor must file a written request for an oral hearing together with the request for review filed under § 30.24(a).

(b) A request filed under paragraph (a) of this section must contain the following in addition to the information filed under § 30.24(b):

(1) An explanation of reason(s) why the debtor believes the Secretary cannot resolve the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii) through a review of the documentary evidence.

(2) An identification of:

(i) The individuals that the debtor wishes to have testify at the oral hearing;

(ii) The specific issues identified in the notice regarding which each individual is prepared to testify; and

(iii) The reasons why each individual's testimony is necessary to resolve the issue.

(c) The Secretary grants a debtor's request for an oral hearing regarding the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii) only if:

(1) (i) A statute authorizes or requires the Secretary to consider waiver of the indebtedness involved;

(ii) The debtor files a request for waiver of the indebtedness with the request for review filed under paragraph (a)(1) of this section; and

(iii) The question of waiver of the indebtedness turns on an issue of credibility or veracity; or

(2) The Secretary determines that the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii) cannot be resolved by review of only the documentary evidence.

(d) Notwithstanding paragraph (b) of this section, the Secretary may deny oral hearings for a class of similar debts if:

(1) The issues identified in the notice under § 30.22(b)(3)(ii) or 30.33(b)(3)(ii) for which an oral hearing was requested, or the issue of waiver, rarely involve issues of credibility or veracity; and

(2) The Secretary determines that review of the documentary evidence is ordinarily an adequate means to correct mistakes.

(e) The Secretary may decline to consider any reasons that the debtor fails to provide in accordance with paragraph (b)(1) of this section.

(Approved by the Office of Management and Budget under control number 1880-0515)

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

[51 FR 24099, July 1, 1986, as amended at 51 FR 35647, Oct. 7, 1986]

§ 30.26 What special rules apply to an oral hearing?

(a) The oral hearing under § 30.25 is not a formal evidentiary hearing subject to 5 U.S.C. 554, unless required by law.

(b) If the Secretary grants an oral hearing, the Secretary notifies the debtor in writing of:

(1) The time and place for the hearing;

(2) The debtor's right to representation; and

(3) The debtor's right to present and cross examine witnesses.

(c) If the Secretary grants an oral hearing, the Secretary designates an official to:

(1) Govern the conduct of the hearing;

(2) Take all necessary action to avoid unreasonable delay in the proceedings;

(3) Review the evidence presented at the hearing, the documents submitted by the debtor, and other relevant evidence; and

(4) After considering the evidence, notify the debtor in writing of the official's decision regarding the issues identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii) and, if appropriate, the question of waiver of the debt.

(d) The official designated under paragraph (c) of this section may decline to hear any witnesses or testimony not identified by the debtor in accordance with § 30.25(b)(2).

(e) The decision of the designated official under paragraph (c) of this section constitutes the final decision of the Secretary.

(Authority: 20 U.S.C. 1221-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

§ 30.27 When does the Secretary enter into a repayment agreement rather than offset?

(a) If a debtor wants an opportunity to enter into a written agreement to repay a debt on terms acceptable to the Secretary, the debtor must:

(1) File a request to enter into such agreement within 20 days after the date of the notice provided under § 30.22; and

(2) File the request at the address specified in the notice.

(b) A request filed under paragraph (a) of this section must contain all information provided to the debtor in the notice under § 30.22 or § 30.33(b) that identifies the debtor and the debt, including the debtor's Social Security number and the program under which the debt arose, together with any corrections of that identifying information.

(c) If the Secretary receives a request filed in accordance with this section, the Secretary may enter into a written agreement requiring repayment in accordance with 4 CFR 102.11, instead of offsetting the debt.

(d) In deciding whether to enter into the agreement, the Secretary may consider:

(1) The Government's interest in collecting the debt; and

(2) Fairness to the debtor.

(e)(1) A debtor that enters into a repayment agreement with the Secretary under this section waives any right to further review by the Secretary of the issues relating to the original debt identified in the notice under § 30.22(b)(3)(ii) or § 30.33(b)(3)(ii).

(2) If a debtor breaches a repayment agreement, the Secretary may offset, or, under § 30.30, refer to another agency for offset:

(i) The amount owing under the agreement; or

(ii) The entire original debt, to the extent not repaid.

(Authority: 20 U.S.C. 1221-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

[51 FR 24099, July 1, 1986, as amended at 51 FR 35647, Oct. 7, 1986]

§ 30.28 When may the Secretary offset before completing the procedures under §§ 30.22–30.27?

(a) The Secretary may offset before completing the procedures otherwise required by §§ 30.22–30.27 if:

(1) Failure to offset would substantially prejudice the Government's ability to collect the debt; and

(2) The amount of time remaining before the payment by the United States which is subject to offset does not reasonably permit completion of the procedures under §§ 30.22–30.27.

(b) If the Secretary offsets under paragraph (a) of this section, the Secretary:

(1) Promptly completes the procedures under §§ 30.22-30.27 after initiating the offset; and

(2) Refunds any amounts recovered under the offset that are later found not to be owed to the United States.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

§ 30.29 What procedures apply when the Secretary offsets to collect a debt owed another agency?

The Secretary may initiate offset to collect a debt owed another Federal agency if:

(a) An official of that agency certifies in writing:

(1) That the debtor owes a debt to the United States;

(2) The amount of the debt; and

(3) That the agency has complied with 4 CFR 102.3; and

(b) For offsets under 31 U.S.C. 3716, the Secretary makes an independent determination that the offset meets the standards under § 30.21(a)(2).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

§ 30.30 What procedures apply when the Secretary requests another agency to offset a debt owed under a program or activity of the Department?

(a) The Secretary may request another Federal agency to offset a debt owed under a program or activity of the Department if the Secretary certifies in writing to the other Federal agency:

(1) That the debtor owes a debt to the United States;

(2) The amount of the debt; and

(3) That the Secretary has complied with 4 CFR 102.3.

(b) Before providing the certification required under paragraph (a) of this section, the Secretary complies with the procedures in §§ 30.20-30.27.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

§ 30.31 How does the Secretary apply funds recovered by offset if multiple debts are involved?

If the Secretary collects more than one debt of a debtor by administrative offset, the Secretary applies the recovered funds to satisfy those debts based on the Secretary's determination of the best interests of the United States, determined by the facts and circumstances of the particular case.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3716(b))

IRS TAX REFUND OFFSET PROCEDURES

§ 30.33 What procedures does the Secretary follow for IRS tax refund offsets?

(a) If a named person owes a debt under a program or activity of the Department, the Secretary may refer the debt for offset to the Secretary of the Treasury after complying with the procedures in §§ 30.20-30.28, as modified by this section.

(b) Notwithstanding § 30.22(b), the notice sent to a debtor under § 30.22 informs the debtor that:

(1) The debt is past due;

(2) The Secretary intends to refer the debt for offset to the Secretary of Treasury;

(3) The debtor has an opportunity to:

(i) Inspect and copy Department records regarding the existence, amount, enforceability, or past-due status of the debt;

(ii) Obtain a review within the Department of the existence, amount, enforceability, or past-due status of the debt;

(iii) Enter into a written agreement with the Secretary to repay the debt; and

(4) The debtor must take an action set forth under paragraph (b)(3) by a date specified in the notice.

(c) Notwithstanding § 30.23(a), if a debtor wants to inspect and copy Department records regarding the existence, amount, enforceability, or past-due status of the debt, the debtor must:

(1) File a written request to inspect and copy the records within 20 days after the date of the notice provided under § 30.22; and

(2) File the request at the address specified in that notice.

(d) Notwithstanding the time frame under § 30.24(a), if a debtor wants a review under that paragraph, the debtor must file a request for review at the address specified in the notice by the later of:

(1) Sixty-five days after the date of the notice provided under § 30.22;

(2) If the debtor has requested an opportunity to inspect and copy records within the time period specified in paragraph (c) of this section, 15 days after the date on which the Secretary makes available to the debtor the relevant, requested records; or

(3) If the debtor has requested a review within the appropriate time frame under paragraph (d) (1) or (2) of this section and the Secretary has provided an initial review by a guarantee agency, seven days after the date of the initial determination by the guarantee agency.

(e) Notwithstanding the time frames under § 30.24(d), a debtor shall file the documents specified under that paragraph with the request for review.

(f) Notwithstanding the time frame under § 30.27(a), a debtor must agree to repay the debt under terms acceptable to the Secretary and make the first payment due under the agreement by the latest of:

(1) The seventh day after the date of decision of the Secretary if the debtor requested a review under § 30.24;

(2) The sixty-fifth day after the date of the notice under § 30.22(b), if the debtor did not request a review under § 30.24, or an opportunity to inspect and copy records of the Department under § 30.23; or

(3) The fifteenth day after the date on which the Secretary made available relevant records regarding the debt, if the debtor filed a timely request under § 30.23(a).

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3720A)

PROCEDURES FOR REPORTING DEBTS TO CONSUMER REPORTING AGENCIES

§ 30.35 What procedures does the Secretary follow to report debts to consume reporting agencies?

(a)(1) The Secretary reports information regarding debts arising under program or activity of the Departmen and held by the Department to consumer reporting agencies, in accordance with the procedures described i this section.

(2) The term "consumer reportin agency", as used in this section, ha the same meaning as provided in 3 U.S.C. 3701(a)(3).

(b) Before reporting information o a debt to a consumer reporting agency the Secretary follows the procedure set forth in § 30.33.

(Authority: 20 U.S.C. 1221e-3(a)(1) an 1226a-1, 31 U.S.C. 3711, § 16023, 16029, Pub L. 99-272)

Subpart D [Reserved]

Subpart E—What Costs and Penaltie Does the Secretary Impose o Delinquent Debtors?

SOURCE: 53 FR 33425, Aug. 30, 1988, unles otherwise noted.

§ 30.60 What costs does the Secretar impose on delinquent debtors?

(a) The Secretary may charge debtor for the costs associated wit the collection of a particular debt These costs include, but are not limited to—

(1) Salaries of employees performin Federal loan servicing and debt collection activities;

(2) Telephone and mailing costs;

(3) Costs for reporting debts credit bureaus;

(4) Costs for purchase of credi bureau reports;

(5) Costs associated with compute operations and other costs associate with the maintenance of records;

(6) Bank charges;

(7) Collection agency costs;

(8) Court costs and attorney fee and

(9) Costs charged by other Governmental agencies.

(b) Notwithstanding any provision of State law, if the Secretary uses a collection agency to collect a debt on a contingent fee basis, the Secretary charges the debtor, and collects through the agency, an amount sufficient to recover—

(1) The entire amount of the debt; and

(2) The amount that the Secretary is required to pay the agency for its collection services.

(c)(1) The amount recovered under paragraph (b) of this section is the entire amount of the debt, multiplied by the following fraction:

$$\frac{1}{1-cr.}$$

(2) In paragraph (c)(1) of this section, cr equals the commission rate the Department pays to the collection agency.

(d) If the Secretary uses more than one collection agency to collect similar debts, the commission rate (cr) described in paragraph (c)(2) of this section is calculated as a weighted average of the commission rates charged by all collection agencies collecting similar debts, computed for each fiscal year based on the formula

$$\sum_{i=1}^{N} \left(\frac{Xi \cdot Yi}{Z}\right)$$

where—

(1) Xi equals the dollar amount of similar debts placed by the Department with an individual collection agency as of the end of the preceding fiscal year;

(2) Yi equals the commission rate the Department pays to that collection agency for the collection of the similar debts;

(3) Z equals the dollar amount of similar debts placed by the Department with all collection agencies as of the end of the preceding fiscal year; and

(4) N equals the number of collection agencies with which the Secretary has placed similar debts as of the end of the preceding fiscal year.

(e) If a debtor has agreed under a repayment or settlement agreement with the Secretary to pay costs associated with the collection of a debt at a specified amount or rate, the Secretary collects those costs in accordance with the agreement.

(f) The Secretary does not impose collection costs against State or local governments under paragraphs (a) through (d) of this section.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3711(e), 3717(e)(1), 3718))

§ 30.61 What penalties does the Secretary impose on delinquent debtors?

(a) If a debtor does not make a payment on a debt, or portion of a debt, within 90 days after the date specified in the first demand for payment sent to the debtor, the Secretary imposes a penalty on the debtor.

(b)(1) The amount of the penalty imposed under paragraph (a) of this section is 6 percent per year of the amount of the delinquent debt.

(2) The penalty imposed under this section runs from the date specified in the first demand for payment to the date the debt (including the penalty) is paid.

(c) If a debtor has agreed under a repayment or settlement agreement with the Secretary to pay a penalty for failure to pay a debt when due, or has such an agreement under a grant or contract under which the debt arose, the Secretary collects the penalty in accordance with the agreement, grant, or contract.

(d) The Secretary does not impose a penalty against State or local governments under paragraphs (a) and (b) of this section.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3711(e))

§ 30.62 When does the Secretary forego interest, administrative costs, or penalties?

(a) For a debt of any amount based on a loan, the Secretary may refrain from collecting interest or charging administrative costs or penalties to the extent that compromise of these amounts is appropriate under the standards for compromise of a debt contained in 4 CFR Part 103.

(b) For a debt not based on a loan the Secretary may waive, or partially waive, the charging of interest, or the collection of administrative costs or penalties, if—

(1) Compromise of these amounts is appropriate under the standards for compromise of a debt contained in 4 CFR Part 103; or

(2) The Secretary determines that the charging of interest or the collection of administrative costs or penalties is—

(i) Against equity and good conscience; or

(ii) Not in the best interests of the United States.

(c) The Secretary may exercise waiver under paragraph (b)(1) of this section without regard to the amount of the debt.

(d) The Secretary may exercise waiver under paragraph (b)(2) of this section if—

(1) The Secretary has accepted an installment plan under 4 CFR 102.11;

(2) There is no indication of fault or lack of good faith on the part of the debtor; and

(3) The amount of interest, administrative costs, and penalties is such a large portion of the installments that the debt may never be repaid if that amount is collected.

(e)(1) The Secretary does not charge interest on any portion of a debt, other than a loan, owed by a person subject to 31 U.S.C. 3717 if the debt is paid within 30 days after the date of the first demand for payment.

(2) The Secretary may extend the period under paragraph (e)(1) of this section if the Secretary determines that the extension is appropriate.

(Authority: 20 U.S.C. 1221e-3(a)(1) and 1226a-1, 31 U.S.C. 3711(e))

Subpart F—What Requiremen Apply to the Compromise of Debt or the Suspension or Term nation of Collection Action?

§ 30.70 How does the Secretary exerci discretion to compromise a debt or suspend or terminate collection of debt?

(a) The Secretary uses the standard in the FCCS, 4 CFR Part 103, to deter mine whether compromise of a debt appropriate if—

(1) The debt must be referred to th Department of Justice under this sec tion; or

(2) The amount of the debt is les than or equal to $20,000 and the Sec retary does not follow the procedure in paragraph (e) of this section.

(b) The Secretary refers a debt the Department of Justice to decid whether to compromise a debt if—

(1) The debt was incurred under program or activity subject to sectio 452(f) of the General Education Prov sions Act and the initial determinatio of the debt was more than $50,000; o

(2) The debt was incurred under program or activity not subject to sec tion 452(f) of the General Educatio Provisions Act and the amount of th debt is more than $20,000.

(c) The Secretary may compromis the debt under the procedures in par graph (e) of this section if—

(1) The debt was incurred under program or activity subject to sectio 452(f) of the General Education Prov sions Act; and

(2) The initial determination of th debt was less than or equal to $50,00

(d) The Secretary may compromise debt without following the procedur in paragraph (e) of this section if th amount of the debt is less than o equal to $20,000.

(e) The Secretary may compromis the debt pursuant to paragraph (c) o this section if—

(1) The Secretary determines that—

(i) Collection of any or all of th debt would not be practical or in th public interest; and

(ii) The practice that resulted in th debt has been corrected and will no recur;

(2) At least 45 days before compromising the debt, the Secretary publishes a notice in the FEDERAL REGISTER stating—

(i) The Secretary's intent to compromise the debt; and

(ii) That interested persons may comment on the proposed compromise; and

(3) The Secretary considers any comments received in response to the FEDERAL REGISTER notice before finally compromising the debt.

(f)(1) The Secretary uses the standards in the FCCS, 4 CFR Part 104, to determine whether suspension or termination of collection action is appropriate.

(2) The Secretary—

(i) Refers the debt to the Department of Justice to decide whether to suspend or terminate collection action if the amount of the debt at the time of the referral is more than $20,000; or

(ii) May decide to suspend or terminate collection action if the amount of the debt at the time of the Secretary's decision is less than or equal to $20,000.

(g) In determining the amount of a debt under paragraphs (a) through (f) of this section, the Secretary excludes interest, penalties, and administrative costs.

(h) Notwithstanding paragraphs (b) through (f) of this section, the Secretary may compromise a debt, or suspend or terminate collection of a debt, in any amount if the debt arises under the Guaranteed Student Loan Program authorized under Title IV, Part B, of the Higher Education Act of 1965, as amended, or the Perkins Loan Program authorized under Title IV, Part E, of the Higher Education Act of 1965, as amended.

(i) The Secretary refers a debt to the General Accounting Office (GAO) for review and approval before referring the debt to the Department of Justice for litigation if—

(1) The debt arose from an audit exception taken by GAO to a payment made by the Department; and

(2) The GAO has not granted an exception from the GAO referral requirement.

(j) Nothing in this section precludes—

(1) A contracting officer from exercising his authority under applicable statutes, regulations, or common law to settle disputed claims relating to a contract; or

(2) The Secretary from redetermining a claim.

(Authority: 20 U.S.C. 1082(a) (5) and (6), 1087hh, 1221e-3(a)(1), 1226a-1, and 1234a(f), 31 U.S.C. 3711(e))

[53 FR 33425, Aug. 30, 1988]

Subpart G [Reserved]

PART 31—SALARY OFFSET FOR FEDERAL EMPLOYEES WHO ARE INDEBTED TO THE UNITED STATES UNDER PROGRAMS ADMINISTERED BY THE SECRETARY OF EDUCATION

Sec.

31.1 Scope.
31.2 Definitions.
31.3 Pre-offset notice.
31.4 Request to inspect and copy documents relating to a debt.
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31.6 Location and timing of oral hearing.
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31.10 Request for repayment agreement.
31.11 Offset process.

AUTHORITY: 5 U.S.C. 5514; 31 U.S.C. 3716.

SOURCE: 54 FR 31821, Aug. 19, 1989, unless otherwise noted.

§ 31.1 Scope.

(a) *General.* The Secretary establishes the standards and procedures in this part that apply to the offset from disposable pay of a current or former Federal employee or from amounts payable from the Federal retirement account of a former Federal employee to recover a debt owed the United States under a program adminstered by the Secretary of Education.

(b) *Exclusions.* This part does not apply to—

(1) Offsets under 34 CFR Part 32 to recover for overpayments of pay or allowances to an employee of the Department;

(2) Offsets under 34 CFR Part 30; or

(3) Offsets under Sec. 124 of Pub. L. 97-276 to collect debts owed to the United States on judgments.

(c) *Reports to consumer reporting agency.* The Secretary may report a debt to a consumer reporting agency after notifying the employee, in accordance with 34 CFR 30.35, of the intention to report the debt, and after providing the employee an opportunity to inspect documents, receive a hearing, and enter into a repayment agreement under this part.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3711; 31 U.S.C. 3716)

§ 31.2 Definitions

As used in this part:

"Agency" means—

(1) An Executive agency as defined in 5 U.S.C. 105, including the U.S. Postal Service and the U.S. Postal Rate Commission;

(2) A military department as defined in 5 U.S.C. 102;

(3) An agency or court in the judicial branch, including a court as defined in 28 U.S.C. 610, the District Court for the Northern Mariana Islands, and the Judicial Panel on Multidistrict Litigation;

(4) An agency of the legislative branch, including the U.S. Senate and the U.S. House of Representatives; and

(5) Any other independent establishment that is an entity of the Federal Government.

"Days" refer to calendar days.

"Department" means the Education Department.

"Disposable pay" means the amount that remains from an employee's pay after required deductions for Federal, State, and local income taxes; Social Security taxes, including Medicare taxes; Federal retirement programs; premiums for basic life insurance and health insurance benefits; and such other deductions that are required by law to be withheld.

"Employee" means a current or former employee of an agency. In the case of an offset proposed to collect a debt owed by a deceased employee, the references in this part to the employee shall be read to refer to the payee of benefits from the Federal retirem
account or other pay of the emplo

"Federal retirement account" me
an account of an employee under
Civil Service Retirement System
the Federal Employee Retirem
System.

"Offset" means a deduction fr
the pay of an employee, or a paym
due from the Federal retirement
count of an employee, to satisf
debt.

"Pay" means basic pay, special
incentive pay, retired pay, reta
pay, or, in the case of an indivi
not entitled to basic pay, other aut
ized pay, including severance pay
lump sum payments for acc
annual leave, and amounts pay
from the Federal retirement acc
of an employee.

"Secretary" means the Secretar
the Department of Education or a
ficial or employee of the Departm
acting for the Secretary under a d
gation of authority.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 371

§ 30.3 Pre-offset notice.

(a) At least 65 days before initia
an offset against the pay of an
ployee, the Secretary sends a wri
notice to the employee stating—

(1) The nature and amount of
debt;

(2) A demand for payment of
debt;

(3) The manner in which the Se
tary charges interest, administr
costs, and penalties on the debt;

(4) The Secretary's intention to
lect the debt by offset against—

(i) 15 percent of the employee's
rent disposable pay; and

(ii) If the debt cannot be satisfie
offset against current disposable
a specified amount of severance p
lump sum annual leave paymen
final salary check, or payments
the Federal retirement account o
employee;

(5) The amount, frequency, app
mate beginning date and duratio
the proposed offset;

(6) The employee's opportunity

(i) Inspect and copy Depart
records pertaining to the debt;

(ii) Obtain a pre-offset hearing before a hearing official who is not under the control or supervision of the Secretary regarding the existence or amount of the debt, or the proposed offset schedule; and

(iii) Enter into a written agreement with the Secretary to repay the debt;

(7) The date by which the employee must request an opportunity set forth under paragraph (a)(6) of this section;

(8) The grounds for objecting to collection of the debt by offset;

(9) The applicable hearing procedures and requirements;

(10) That the Secretary grants any request for access to records, for a hearing, or for a satisfactory repayment agreement made by an employee;

(11) That the Secretary does not delay the start of the proposed offset, or suspend an offset already commenced, unless—

(i) An employee makes the request for access to records or for a hearing, or enters into a repayment agreement that is acceptable to the Secretary, before the deadlines described in this part; or

(ii) An employee requests a hearing after the deadlines established in § 31.5(a), but submits evidence satisfactory to the Secretary that the request was not made in a timely manner because the employee did not have notice of the proposed offset, or was prevented from making the request by factors beyond his or her control, until after the deadlines had passed;

(12) That a final decision on the hearing will be issued not later than 60 days after the date on which the employee files a request for a hearing under § 31.5, unless a delay in the proceedings is granted at the request of the employee;

(13) That submission by the employee of knowingly false statements, representations or evidence may subject the employee to applicable disciplinary procedures, or civil or criminal penalties; and

(14) That any amounts paid or collected by offset on a debt later determined to be unenforceable or canceled will be refunded to the employee.

(b)(1) In determining whether an employee has requested an opportunity set forth under paragraph (a)(6) of this section in a timely manner, the Secretary relies on—

(i) A legibly dated U.S. Postal Service postmark for the employee's request; or

(ii) A legibly stamped U.S. Postal Service mail receipt for the employee's request.

(2) The Secretary does not rely on either of the following as proof of mailing:

(i) A private metered postmark.

(ii) A mail receipt that is not dated by the U.S. Postal Service.

(c) Payment by offset under this part of all or part of a debt does not constitute an acknowledgment of the debt or a waiver of rights available to the employee under this part or other applicable law if the employee has not agreed in writing to the offset.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 31.4 Request to inspect and copy documents relating to a debt.

(a) The Secretary makes available for inspection and copying before offset under this part those Department documents that relate to the debt, if the employee—

(1) Files a written request to inspect and copy the documents within 20 days of the date of the pre-offset notice under § 31.3, and

(2) Files the request at the address specified in that notice.

(b) A request filed under paragraph (a)(1) of this section must contain—

(1) All information provided to the employee in the pre-offset notice under § 31.3 that identifies the employee and the debt, including the employee's Social Security number and the program under which the debt arose, together with any corrections of that identifying information; and

(2) A reasonably specific identification of the documents that the employee wishes to have available for inspection and copying.

(c) The Secretary makes available documents for inspection and copying upon request by the employee. However, the Secretary may initiate an offset before making the requested documents available if the employee fails to request inspection and copying in accordance with this section.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 31.5 Request for hearing on the debt or the proposed offset.

(a) *Deadlines.* (1) The Secretary provides a hearing before offset on the existence, amount, or enforceability of the debt described in the pre-offset notice provided under § 31.3, or on the amount or frequency of the offsets as proposed in that notice, if the employee—

(i) Files a request for the hearing within the later of—

(A) 65 days after the date of the pre-offset notice provided under § 31.3; or

(B) 15 days after the date on which the Secretary makes available to the employee the relevant, requested documents if the employee had requested an opportunity to inspect and copy documents within 20 days of the date of the pre-offset notice provided under § 31.3; and

(ii) Files a request at the address specified in that notice.

(2) The Secretary provides a hearing upon request by the employee. However, if the employee does not submit, within the deadlines in paragraph (a)(1) of this section, a request that meets the requirements of paragraphs (b) and (c) of this section, the Secretary does not delay the start of an offset, or suspend an offset already commenced, unless the employee submits evidence satisfactory to the Secretary that the request was not made in a timely manner because the employee did not have notice of the proposed offset, or was otherwise prevented from making the request by factors beyond his or her control, until after the deadlines had passed.

(b) *Contents of request for a hearing.* A request for a hearing must contain—

(1) All information provided to the employee in the pre-offset notice under § 31.3 that identifies the employee and the particular debt, including the employee's Social Security number and the program under which the debt arose, together with any corrections needed with regard to that identifying information;

(2) An explanation of the reasons why the employee believes that—

(i) The debt as stated in the pre-offset notice is not owing or is not enforceable by offset; or

(ii) The amount of the proposed offset described in the pre-offset notice will cause extreme financial hardship to the employee;

(3) If the employee contends that the amount of the proposed offset will cause extreme financial hardship under the standards set forth in § 31.8(b)—

(i) An alternative offset proposal;

(ii) An explanation, in writing, showing why the offset proposed in the notice would cause an extreme financial hardship for the employee; and

(iii) Documents that show for the employee and for the spouse and dependents of the employee, for the one-year period preceding the Secretary's notice and for the repayment period proposed by the employee in his or her offset schedule—

(A) Income from all sources,

(B) Assets,

(C) Liabilities,

(D) Number of dependents,

(E) Expenses for food, housing, clothing, and transportation,

(F) Medical expenses, and

(G) Exceptional expenses, if any; and

(4) Copies of all documents that the employee wishes to have considered to support the objections raised by the employee regarding the enforceability of the debt or the claim of extreme financial hardship.

(c) *Request for oral hearing.* (1) If the employee wants the hearing to be conducted as an oral hearing, the employee must submit a request that contains the information listed in paragraph (b) and must include with the request—

(i) An explanation of reasons why the employee believes that the issues raised regarding the enforceability of the debt or a claim of extreme financial hardship cannot be resolved adequately by a review of the written statements and documents provided with the request for a hearing;

(ii) An identification of—

A) The individuals that the employ- wishes to have testify at the oral aring;

B) The specific issues about which ch individual is prepared to testify; d

(C) The reasons why each individ- l's testimony is necessary to resolve e issue.

(2) The Secretary grants a request r an oral hearing if—

(i) The employee files a request for n oral hearing that meets the re- uirements of paragraphs (b) and (c) f this section; and

(ii) The Secretary determines that he issues raised by the employee re- uire a determination of the credibil- ty of testimony and cannot be ade- quately resolved by a review of the written statements and documents submitted by the employee and documents contained in the Department's records relating to the debt.

(3) The Secretary may decline a request for an oral hearing if the Secretary accepts the employee's proffer of testimomy made in the request for an oral hearing under paragraph (c)(1) of this section, and considers the facts at issue to be established as stated by the employee in the request.

(4) If the Secretary grants a request for an oral hearing, the Secretary—

(i) Notifies the employee in writing of—

(A) The date, time, and place of the hearing;

(B) The name and address of the hearing official;

(C) The employee's right to be represented at the hearing by counsel or other representatives;

(D) The employee's right to present and cross-examine witnesses; and

(E) The employee's right to waive the requested oral hearing and receive a hearing in the written record; and

(ii) Provides the hearing official with a copy of all written statements submitted by the employee with the request for a hearing, and all documents pertaining to the debt or the amount of the offset contained in the Department's files on the debt or submitted with the request for a hearing.

(d) *Employee choice of oral hearing or hearing on written submissions.* An employee who has been sent notice under paragraph (c)(4) that an oral hearing will be provided must, within 15 days of the date of that notice, state in writing to the hearing official and the Secretary—

(1) Whether the employee intends to proceed with the oral hearing, or wishes a decision based on the written record; and

(2) Any changes in the list of the witnesses the employee proposes to produce for the hearing, or the facts about which a witness will testify.

(e) *Dismissal of request for hearing.* The Secretary considers the employee to have waived the request for a hearing of any kind—

(1) If an employee does not provide the hearing official in a timely manner the written statement required under paragraph (d) of this section; or

(2) If the employee does not appear for a scheduled oral hearing.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 31.6 Location and timing of oral hearing.

(a) If the Secretary grants a request for an oral hearing, the Secretary selects the time, date, and location of the hearing. The Secretary selects, to the extent feasible, the location that is most convenient for the employee.

(b) For a current military employee, the Secretary selects the time, date, and location of the hearing after consultation with the Secretary of Defense.

(c) For a current Coast Guard employee, the Secretary selects the time, date, and location of the hearing after consultation with the Secretary of Transportation.

(d) For an employee not described in paragraph (a) or (b) of this section, the hearing will be held in Washington, DC, or in one of the following cities: Boston, Philadelphia, New York, Atlanta, Chicago, Dallas, Kansas City, Denver, San Francisco, or Seattle.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 31.7 Hearing procedures.

(a) *Independence of hearing official.* A hearing provided under this part is conducted by a hearing official who is neither an employee of the Department nor otherwise under the supervision or control of the Secretary.

(b) *Lack of subpoena authority or formal discovery.* (1) Neither the hearing official nor the Secretary has authority to issue subpoenas to compel the production of documents or to compel the attendance of witnesses at an oral hearing under this part. The Secretary will attempt to make available during an oral hearing the testimony of a current official of the Department if—

(i) The employee had identified the official in the request for a hearing under § 31.5(b) and demonstrated that the testimony of the official is necessary to resolve adequately an issue of fact raised by the employee in the request for a hearing; and

(ii) The Secretary determines that the responsibilities of the official permit his or her attendance at the hearing.

(2) If the Secretary determines that the testimony of a Department official is necessary, but that the official cannot attend an oral hearing to testify, the Secretary attempts to make the official available for testimony at the hearing by means of a telephone conference call.

(3) No discovery is available in a proceeding under this part except as provided in § 31.4.

(c) *Hearing on written submissions.* If a hearing is conducted on the written submissions, the hearing official reviews documents and responses submitted by the Secretary and the employee under § 31.5.

(d) *Conduct of oral hearing.* (1) The hearing official conducts an oral hearing as an informal proceeding. The official—

(i) Administers oaths to witnesses;

(ii) Regulates the course of the hearing;

(iii) Considers the introduction of evidence without regard to the rules of evidence applicable to judicial proceedings; and

(iv) May exclude evidence that is redundant, or that is not relevant to those issues raised by the employee in the request for hearing under § 31.5 that remain in dispute.

(2) An oral hearing is generally open to the public. However, the hearing official may close all or any portion of the hearing if doing so is in the best interest of the employee or the public.

(3) The hearing official may conduct an oral hearing by telephone conference call—

(i) If the employee is located in a city outside the Washington, D.C. Metropolitan area.

(ii) At the request of the employee.

(iii) At the discretion of the hearing official.

(4) No written record is created or maintained of an oral hearing provided under this part.

(e) *Burden of proof.* In any hearing under this part—

(1) The Secretary bears the burden of proving, by a preponderance of the evidence, the existence and amount of the debt, and the failure of the employee to repay the debt, as the debt is described in the pre-offset notice provided under § 31.3; and

(2) The employee bears the burden of proving, by a preponderance of the evidence—

(i) The existence of any fact that would establish that the debt described in the pre-offset notice is not enforceable by offset; and

(ii) The existence of any fact that would establish that the amount of the proposed offset would cause an extreme financial hardship for the employee.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 31.8 Rules of decision.

(a) *Enforceability of debt by offset.* In deciding whether the Secretary has established that the debt described in the pre-offset under § 31.3 is owed by the employee, or whether the employee has established that the debt is not enforceable by offset, the hearing official shall apply the principles in this paragraph.

(1) The statutes and Department regulations authorizing and implementing the program under which the debt arose must be applied in accordance with official written interpretations by the Department.

(2) The principles of res judicata and collateral estoppel apply to resolution

of disputed facts in those instances in which the debt or material facts in dispute have been the subject of prior judicial decision.

(3) The act or omission of an institution of higher education at which the employee was enrolled does not constitute a defense to repayment of an obligation with regard to a grant or loan under a program authorized under Title IV of the Higher Education Act or similar authority, except to the extent that—

(i) The act or omission constitutes a defense to the debt under applicable Federal or State law;

(ii) The institution owed the employee a refund under its refund policy and failed to pay that refund to the employee or to a lender holding a loan made to the employee; or

(iii) The institution ceased teaching activity while the employee was in attendance and during the academic period for which the grant or loan was made, and failed to refund to the employee or holder of a loan to the employee a proportionate amount of the grant or loan funds used to pay tuition and other institutional charges for that academic period.

(4)(i) A debt otherwise established as owed by the employee is enforceable by offset under this part if the Secretary sends the pre-offset notice for the debt within the ten year period following the later of—

(A) The date on which the Secretary acquired the debt by assignment or referral, or

(B) The date of a subsequent partial payment reaffirming the debt.

(ii) Periods during which the statute of limitations applicable to a lawsuit to collect the debt has been tolled under 11 U.S.C. 108, 28 U.S.C. 2416, 50 U.S.C. App. 525, or other authority are excluded from the calculation of the ten year period described in paragraph (a)(4)(i) of this section.

(b) *Extreme financial hardship.* (1) In deciding whether an employee has established that the amount of the proposed offset would cause extreme financial hardship to the employee, the hearing official shall determine whether the credible, relevant evidence submitted demonstrates that the proposed offset would prevent the employee from meeting the costs necessarily incurred for essential subsistence expenses of the employee and his or her spouse and dependents.

(2) For purposes of this determination, essential subsistence expenses include costs incurred only for food, housing, clothing, essential transportation and medical care.

(3) In making this determination, the hearing official shall consider—

(i) The income from all sources of the employee, and his or her spouse and dependents;

(ii) The extent to which the assets of the employee and his or her spouse and dependents are available to meet the offset and the essential subsistence expenses;

(iii) Whether these essential subsistence expenses have been minimized to the greatest extent possible;

(iv) The extent to which the employee and his or her spouse and dependents can borrow to satisfy the debt to be collected by offset or to meet essential expenses; and

(v) The extent to which the employee and his or her spouse and dependents have other exceptional expenses that should be taken into account, and whether these expenses have been minimized.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 31.9 Decision of the hearing official.

(a) The hearing official issues a written opinion within sixty days of the date on which the employee filed a request for a hearing under § 31.5, unless a delay in the proceedings has been granted at the request of the employee. In the opinion, the hearing official states his or her decision and the findings of fact and conclusions of law on which the decision is based.

(b) If the hearing official finds that a portion of the debt described in the pre-offset notice under § 31.3 is not enforceable by offset, the official shall state in the opinion that portion which is enforceable by offset.

(c) If the hearing official finds that the amount of the offset proposed in the pre-offset notice will cause an extreme financial hardship for the employee, the hearing official shall establish an offset schedule that will result in the repayment of the debt in the shortest period of time without producing an extreme financial hardship for the employee.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 31.10 Request for repayment agreement.

(a) The Secretary does not initiate an offset under this part if the employee agrees in writing to repay the debt under terms acceptable to the Secretary and makes the first payment due under the agreement on or before the latest of—

(1) The seventh day after the date of the decision of the hearing official, if the employee timely requested a hearing under § 31.5 (a) and (d);

(2) The sixty-fifth day after the date of the pre-offset notice under § 31.3 if the employee did not timely request either a hearing in accordance with § 31.5 (a) and (d) or an opportunity to inspect and copy documents related to the debt under § 31.4; or

(3) The fifteenth day after the date on which the Secretary made available documents related to the debt, if the employee filed a timely request for documents under § 31.4.

(b) In the agreement, the Secretary and the employee may agree to satisfaction of the debt from sources other than an offset under this part, or may modify the amount proposed to be offset in the pre-offset notice or estimated in the decision of the hearing official.

(c) If the employee does not enter into a repayment agreement acceptable to the Secretary within the deadlines in this section, the Secretary may initiate an offset under this part. The Secretary continues to collect by offset until an employee enters in a satisfactory repayment agreement for the debt. The Secretary suspends an offset already commenced under circumstances described in § 31.5(a)(2).

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 31.11 Offset process.

(a) The Secretary attempts to collect debts under this part within the shortest time authorized under—

(1) The offset schedule proposed in the pre-offset notice, unless modified by agreement or by the decision of a hearing official;

(2) A written repayment agreement with the employee; or

(3) The offset schedule established in the decision of the hearing official.

(b) In proposing an offset schedule under § 31.3 or establishing a repayment agreement under § 31.10, the Secretary also considers the expected period of Federal employment of the employee.

(c) Unless the Secretary determines, in his discretion, to delay or suspend collection, the Secretary effects an offset under this part—

(1) According to the terms agreed to by the employee pursuant to a timely request under § 31.10 to enter into a repayment agreement; or,

(2) After the deadlines in § 31.10(a) for requesting a repayment agreement with the Secretary.

(d) If the employee retires, resigns, or leaves Federal employment before the debt is satisfied, the Secretary collects the amount necessary to satisfy the debt by offset from subsequent payments of any kind, including a final salary payment or a lump sum annual leave payment, due the employee on the date of separation. If the debt cannot be satisfied by offset from any such final payment due the employee on the date of separation, the Secretary collects the debt from later payments of any kind due the employee in accordance with the provisions of 4 CFR 102.4.

(e) The Secretary effects an offset under this part against payments owing to an employee of another Federal agency after completion of the requirements of this part, in accordance with the provisions of 5 CFR 550.1108.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

PART 32—SALARY OFFSET TO RECOVER OVERPAYMENTS OF PAY OR ALLOWANCES FROM DEPARTMENT OF EDUCATION EMPLOYEES

Sec.

32.1 Scope.
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32.10 Deductions process.

AUTHORITY: 5 U.S.C. 5514; 31 U.S.C. 3716.

SOURCE: 52 FR 24957, July 1, 1987, unless otherwise noted.

§ 32.1 Scope.

(a) The Secretary establishes the standards and procedures in this part that apply to the deductions through offset from disposable pay of a current or former employee of the Department of Education to recover overpayments of pay or allowances.

(b) This part does not apply to—

(1) Recovery through offset of an indebtedness to the United States by an employee of the Department under a program administered by the Secretary of Education covered under 34 CFR Part 31;

(2) The offset of an indebtedness to the United States by a Federal employee to satisfy a judgment obtained by the United States against that employee in a court of the United States;

(3) The offset of any payment to an employee of the Department of Education which is expressly allowed under statutes other than 5 U.S.C. 5514, except as to offsets of severance pay and/or lump sum annual leave payments as authorized under 31 U.S.C. 3716;

(4) Offsets under 34 CFR Part 30; or

(5) An employee election of coverage or of a change of coverage under a Federal benefits program which requires periodic deductions from pay if the amount to be recovered was accumulated over four pay periods or less.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.2 Definitions.

The following definitions apply to this part:

Department means the Department of Education.

Disposable pay means the amount that remains from an employee's pay after required deductions for Federal, State, and local income taxes; Social Security taxes, including Medicare taxes; Federal retirement programs; premiums for health and basic life insurance benefits; and such other deductions that are required by law to be withheld.

Employee means a current or former employee of the Department.

Former employee means a former employee of the Department who is entitled to pay from the Department or another agency.

Pay means basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an individual not entitled to basic pay, other authorized pay, including severance pay and/or lump sum payments for accrued annual leave.

Paying agency means a Federal agency currently employing an individual and authorizing the payment of his or her current pay.

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.3 Pre-offset notice.

At least 30 days before initiating a deduction from the disposable pay of an employee to recover an overpayment of pay or allowances, the Secretary sends a written notice to the employee stating—

(a) The origin, nature and amount of the overpayment;

(b) How interest is charged and administrative costs and penalties will be assessed, unless excused under 31 U.S.C. 3716;

(c) A demand for repayment, providing for an opportunity for the employee to enter into a written repayment agreement with the Department;

(d) Where a waiver of repayment is authorized by law, the employee's right to request a waiver;

(e) The Department's intention to deduct 15 percent of the employee's disposable pay, or a specified amount if the disposable pay is severance pay and/or a lump sum annual leave payment, to recover the overpayment if a waiver is not granted by the Secretary and the employee fails to repay the overpayment or enter into a written repayment agreement;

(f) The amount, frequency, approximate beginning date and duration of the intended deduction;

(g) If Government records on which the determination of overpayment are not attached, how those records will be made available to the employee for inspection and copying;

(h) The employee's right to request a pre-offset hearing concerning the existence or amount of the overpayment or an involuntary repayment schedule;

(i) The applicable hearing procedures and requirements, including a statement that a timely petition for hearing will stay commencement of collection proceedings and that a final decision on the hearing will be issued not later than 60 days after the hearing petition is filed, unless a delay is requested and granted;

(j) That any knowingly false or frivolous statements, representations or evidence may subject the employee to applicable disciplinary procedures, civil or criminal penalties; and

(k) That where amounts paid or deducted are later waived or found not owed, unless otherwise provided by law, they will be promptly refunded to the employee.

(Authority: 5 U.S.C. 5514, 31 U.S.C. 3716)

§ 32.4 Employee response.

(a) *Voluntary repayment agreement.* Within 7 days of receipt of the written notice under § 32.3, the employee may submit a request to the Secretary to arrange for a voluntary repayment schedule. To arrange for a voluntary repayment schedule, the employee shall submit a financial statement and sign a written repayment agreement approved by the Secretary. An employee who arranges for a voluntary repayment schedule may nonetheless request a waiver of the overpayment under paragraph (b) of this section.

(b) *Waiver.* An employee seeking a waiver of collection of the debt that is authorized by law must request the waiver in writing to the Secretary within 10 days of receipt of the written notice under § 32.3. The employee must state why he or she believes a waiver should be granted.

(c) *Involuntary repayment schedule.* If the employee claims that the amount of the involuntary deduction will cause extreme financial hardship and should be reduced, he or she must submit a written explanation and a financial statement signed under oath or affirmation to the Secretary within 10 days of receipt of the written notice under § 32.3. An employee who fails to submit this financial information in a timely manner waives the right to object to the involuntary repayment schedule at a hearing under § 32.5. The Secretary notifies the employee, in writing, whether the Secretary will reduce the rate of the involuntary deduction.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.5 Pre-offset hearing—general.

(a) An employee who wishes a review of the existence or amount of the overpayment or an involuntary repayment schedule may request a pre-offset hearing. The pre-offset hearing does not review:

(1) The denial of a waiver of repayment under 5 U.S.C. 5584;

(2) The involuntary repayment schedule or financial hardship caused by the amount of the involuntary deduction from the employee's disposable pay, unless the employee has submitted the financial statement and written explanation required under § 32.4(c); and

(3) The determination under paragraph (b) of this section that the pre-offset hearing is on the written submissions.

(b) Unless the Secretary determines that a matter reviewable under paragraph (a) of this section turns on an issue of credibility or veracity or cannot be resolved by a review of the documentary evidence, the pre-offset hearing is on the written submissions.

(c) A pre-offset hearing is based on the written submissions for overpayments arising from:

(1) A termination of a temporary promotion;

(2) A cash award;

(3) An erroneous salary rate;

(4) Premature granting of a within-grade increase;

(5) A lump sum payment for annual leave;

(6) Unauthorized appointment to a position;

(7) An error on time and attendance records; or

(8) Other circumstances where the Secretary determines that an oral hearing is not required.

(d) The hearing is conducted by a hearing official who is not an employee of the Department or under the supervision or control of the Secretary.

(e) Formal discovery between the parties is not provided.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.6 Request for a pre-offset hearing.

(a) Except for an employee who has requested a waiver of collection of the debt under § 32.4(b), an employee who wishes a pre-offset hearing must request the hearing within 15 days of receipt of the written notice given under § 32.3. The Secretary waives the 15-day requirement if the employee shows that the delay was because of circumstances beyond his or her control or because of failure to receive notice and lack of knowledge of the time limit.

(b) An employee who has requested a waiver under § 32.4(b) may request a hearing within 10 days of receipt of a determination by the Secretary denying a waiver.

(c) The request for a hearing must:

(1) Be in writing;

(2) State why the employee:

(i) Contests the existence or amount of the overpayment; or

(ii) Claims that the involuntary repayment schedule will cause extreme financial hardship;

(3) Include all documents on which the employee is relying, other than those provided by the Secretary under § 32.3; any document which is a statement of an individual must be in the form of an affidavit; and

(4) Be submitted to the designated hearing official with a copy to the Secretary.

(d) If the employee timely requests a pre-offset hearing or the timelines are waived under paragraph (a) of this section, the Secretary:

(1) Notifies the employee whether the employee may elect an oral hearing; and

(2) Provides the hearing official with a copy of all records on which the determination of the overpayment and any involuntary repayment schedule are based.

(e) An employee who has been given the opportunity to elect an oral hearing and who does elect an oral hearing must notify the hearing official and the Secretary of his or her election in writing within 7 days of receipt of the notice under paragraph (d)(1) of this section and must identify all proposed witnesses and all facts and evidence about which they will testify.

(f) Where an employee requests an oral hearing, the hearing official notifies the Secretary and the employee of the date, time, and location of the hearing. However:

(1) The employee subsequently may elect to have the hearing based only on the written submissions by notifying the hearing official and the Secretary at least 3 calendar days before the date of the oral hearing. The hearing official may waive the 3-day requirement for good cause when the employee notifies the hearing official before the date of the hearing; and

(2) The request for a hearing of an employee who fails to appear at the oral hearing must be dismissed and the Secretary's decision affirmed.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.7 Pre-offset oral hearing.

(a) Oral hearings are informal in nature. The Secretary and the employee, through their representatives, and by reference to the documentation submitted, explain their case. The employee may testify on his or her own behalf, subject to cross examination. Other witnesses may be called to testify only where the hearing official determines that their testimony is relevant and not redundant.

(b) The hearing official shall:

(1) Conduct a fair and impartial hearing; and

(2) Preside over the course of the hearing, maintain decorum, and avoid delay in the disposition of the hearing.

(c) The employee may represent himself or herself or may be represented by another person at the hearing. The employee may not be represented by a person whose representation creates an actual or apparent conflict of interest.

(d) Oral hearings are open to the public. However, the hearing official may close all or any portion of the hearing where to do so is in the best interests of the employee or the public.

(e) Oral hearings may be conducted by conference call—

(1) If the employee is located in a city outside the Washington, DC Metropolitan area;

(2) At the request of the employee; or

(3) At the discretion of the hearing official.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.8 Pre-offset hearing on the written submissions.

If a hearing is to be held on the written submissions, the hearing official reviews the records and responses submitted by the Secretary and the employee under § 32.6.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.9 Written decision.

(a) The hearing official issues a written decision stating the facts supporting the nature and origin of the debt and the hearing official's analysis, findings and conclusions as to the amount of the debt and the repayment schedule within 60 days of filing of the employee's request for a pre-offset hearing, unless the employee requests, and the hearing official grants, a delay in the proceedings.

(b) The hearing official decides whether the Secretary's determination of the existence and the amount of the overpayment or the extreme financial hardship caused by the involuntary repayment schedule is clearly erroneous. A determination is clearly erroneous if although there is evidence to support the determination, the hearing official, considering the record as a whole, is left with a definite and firm conviction that a mistake was made.

(c) In making the decision, the hearing official is governed by applicable Federal statutes, rules and regulations.

(d) The hearing official decides the issue of extreme financial hardship caused by the involuntary repayment schedule only where the employee has submitted the financial statement and written explanation required under § 32.4(c). Where the hearing official determines that the involuntary repayment schedule creates extreme financial hardship, he or she must establish a schedule that alleviates the financial hardship but may not reduce the involuntary repayment schedule to a deduction of zero percent.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

§ 32.10 Deductions process.

(a) Debts must be collected in one lump sum where possible. If the employee does not agree to a lump sum that exceeds 15 percent of disposable pay, the debt must be collected in installment deductions at officially established pay intervals in the amount established under:

(1) A voluntary repayment agreement;

(2) An involuntary repayment schedule where no hearing is requested; or

(3) The schedule established under the written hearing decision.

(b) Installment deductions must be made over a period not greater than the anticipated period of employment, except as provided under paragraph (d) of this section. If possible, the installment payment must be sufficient in size and frequency to liquidate the debt in, at most, three years. Installment payments of less than $25 may be accepted only in the most unusual circumstances.

(c) Deductions must begin:

(1) After the employee has entered a voluntary repayment schedule;

(2) If a waiver is requested under § 32.4(b), after the employee has been denied a waiver by the Secretary; or

(3) If a hearing is requested under § 32.5, after a written decision.

(d) If the employee retires or resigns or his or her employment ends before collection of the debt is completed, the amount necessary to liquidate the debt must be offset from subsequent payments of any nature (for example, final salary payment and/or lump sum annual leave payment) due the employee on the date of separation. If the debt cannot be liquidated by offset from any such final payment due the employee on the date of separation, the debt must be liquidated by administrative offset pursuant to 31 U.S.C. 3716 from later payments of any kind due the employee, where appropriate. After the Secretary has complied with the procedures in this part, the Secretary may refer the debt to a paying agency for collection by offset under 5 CFR 550.1108.

(e) Interest, penalties and administrative costs on debts collected under this part must be assessed, in accordance with the provisions of 4 CFR 102.13.

(f) An employee's payment, whether voluntary or involuntary, of all or any portion of an alleged debt collected pursuant to this part may not be construed as a waiver of any rights which the employee may have under this part or any other provision of law, except as otherwise provided by law.

(g) Amounts paid or deducted pursuant to this part by an employee for a debt that is waived or otherwise found not owing to the United States or which the Secretary is ordered to refund must be promptly refunded to the employee.

(Authority: 5 U.S.C. 5514; 31 U.S.C. 3716)

PART 33—PROGRAM FRAUD CIVIL REMEDIES ACT

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AUTHORITY: 31 U.S.C. 3801-3812.

SOURCE: 53 FR 15675, May 3, 1988, unless otherwise noted.

§ 33.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. No. 99-509, 6101 through 6104, 100 Stat. 16674 (October 21, 1986), to be codified at 31 U.S.C. 3801 through 3812. This law (31 U.S.C. 3809) requires each Federal department head to promulgate regulations necessary to implement the provisions of the statute.

(Authority: 31 U.S.C. 3809)

(b) *Purpose.* This part:

(1) Establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to

be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to the Department or to its agents; and

(2) Specifies the hearing and appeal rights of persons subject to allegations of liability for those penalties and assessments.

(Authority: 31 U.S.C. 3809)

§ 33.2 Definitions.

As used in this part:

ALJ means an Administrative Law Judge in the Department appointed pursuant to 5 U.S.C. 3105 or detailed to the Department pursuant to 5 U.S.C. 3344.

(Authority: 31 U.S.C. 3801(a)(7)(A))

Benefits, as used in the definition of "statement," means anything of value, including but no limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

(Authority: 31 U.S.C. 3809)

Claim means any request, demand, or submission:

(a) Made to the Department for property, services, or money (including money representing grants, cooperative agreements, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from the Department or to a party to a contract or agreement with the Department:

(1) For property or services if the United States:

(i) Provided the property or services;

(ii) Provided any portion of the funds for the purchase of the property or services; or

(iii) Will reimburse the recipient or party for the purchase of the property or services; or

(2) For the payment of money (including money representing grants, cooperative agreements, loans, insurance, or benefits) if the United States:

(i) Provided any portion of the money requested or demanded;

(ii) Will reimburse the recipient or party for any portion of the money paid on that request or demand; or

(iii) Will guarantee or reinsure any portion of a loan made by the party; or

(c) Made to the Department which has the effect of decreasing an obligation to pay or account for property, services, or money.

(Authority: 31 U.S.C. 3801(a)(3))

Complaint means the administrative complaint served by the reviewing official on the defendant under § 33.7.

(Authority: 31 U.S.C. 3809)

Defendant means any person alleged in a complaint under § 33.7 to be liable for a civil penalty or assessment under § 33.3.

(Authority: 31 U.S.C. 3809)

Department means the United States Department of Education.

(Authority: 31 U.S.C. 3809)

Department head means the Secretary or Under Secretary of the United States Department of Education.

(Authority: 31 U.S.C. 3801(a)(2))

Government means the United States Government.

(Authority: 31 U.S.C. 3809)

Individual means a natural person.

(Authority: 31 U.S.C. 3809)

Initial decision means the written decision of the ALJ required by § 33.10 or § 33.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

(Authority: 31 U.S.C. 3803(h))

Investigating official means the Inspector General of the Department or an officer or employee of the Office of the Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

(Authority: 31 U.S.C. 3801(4)(A)(i))

Knows or has reason to know, means that a person, with respect to a claim or statement:

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

(Authority: 31 U.S.C. 3801(5))

Makes includes the terms presents, submits, and causes to be made, presented, or submitted.

(Authority: 31 U.S.C. 3802(a))

Person means any individual, partnership, corporation, association, or private organization.

(Authority: 31 U.S.C. 3801(a)(6))

Representative means:

(a) an attorney who is a member in good standing of the bar of any State, territory, possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico; or

(b) any other person designated by a party in writing, provided that the designation includes a certification that the party understands the nature and consequences of an administrative enforcement action under this part, and that he or she has the right to representation by counsel or to self-representation.

(Authority: 31 U.S.C. 3803(g)(2)(F))

Reviewing official means the General Counsel of the Department or his or her designee who is:

(a) Not subject to supervision by, or required to report to, the investigating official; and

(b) Not employed in the organizational unit of the Department in which the investigating official is employed; and

(c) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

(Authority: 31 U.S.C. 3801(8))

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made:

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for):

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, cooperative agreement, loan, or benefit from;

The Department, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under the contract or for the grant, loan, cooperative agreement, or benefit, or if the Government will reimburse or reinsure the State, political subdivision, or party for any portion of the money or property under the contract or for the grant, cooperative agreement, loan, or benefit.

(Authority: 31 U.S.C. 3801(9))

§ 33.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Any person who makes a claim that the person knows or has reason to know:

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that:

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed;

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim is considered made to the Department, a recipient, or party when that claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Department, a recipient, or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether the property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section is also subject to an assessment of not more than twice the amount of that claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. The assessment is in lieu of damages sustained by the Government because of that claim.

(Authority: 31 U.S.C. 3802(a)(1))

(b) *Statements.* (1) Any person who makes a written statement that:

(i) The person knows or has reason to know:

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in the statement; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement;

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement is considered made to the Department when the statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Department.

(Authority: 31 U.S.C. 3802(a)(2))

(c) No proof of specific intent to defraud is required to establish liability under this section.

(Authority: 31 U.S.C. 3801(5))

(d) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each of those persons may be held liable for a civil penalty under this section.

(Authority: 31 U.S.C. 3802(a))

(e) In any case in which it is deter-
mined that more than one person is
liable for making a claim under this
section of which the Government has
made payment (including transferred
property or provided services), an as-
sessment may be imposed against any
of those persons or jointly and several-
ly against any combination of those
persons.

(Authority: 31 U.S.C. 3802(a)(1); 3809)

§ 33.4 Investigation.

(a) If an investigating official con
cludes that a subpoena pursuant t
the authority conferred by 31 U.S.C
3604(a) is warranted:

(1) The subpoena so issued mus
notify the person to whom it is ad
dressed of the authority under which
the subpoena is issued and must iden
tify the records or documents sought

(2) The investigating official ma
designate a person to act on his or he
behalf to receive the document
sought; and

(3) The person receiving the subpoe
na is required to tender to the investi
gating official or the person designat
ed to receive the documents a certifi
cation that the documents sough
have been produced, or that the docu
ments are not available and the rea
sons therefore, or that the document
suitably identified, have been with
held based upon the assertion of a
identified privilege.

(Authority: 31 U.S.C. 3804(a))

(b) If the investigating official con
cludes that an action under the Pro
gram Fraud Civil Remedies Act ma
be warranted, the investigating officia
shall submit a report containing th
findings and conclusions of the invest
gation to the reviewing official.

(Authority: 31 U.S.C. 3803(a)(1))

(c) Nothing in this section preclude
or limits an investigating official's di
cretion to refer allegations directly t
the Department of Justice for su
under the False Claims Act or othe
civil relief, or to defer or postpone

report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(Authority: 31 U.S.C. 3809)

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

(Authority: 31 U.S.C. 3803(a)(1))

§ 33.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 33.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 33.3 of this part, the reviewing official transmits to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 33.7.

(b) The notice must include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 33.3;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments. Such a statement may be based upon information then known or an absence of any information indicating that the person may be unable to pay such an amount.

(Authority: 31 U.S.C. 3803(a)(2); 3809(2))

§ 33.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 33.7 only if—

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1); and

(2) In the case of allegations of liability under § 33.3(a) with respect to a claim, the reviewing official determines that, with respect to that claim or a group of related claims submitted at the same time the claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 33.3(a) does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time includes only those claims arising from the same transaction (*e.g.*, grant, cooperative agreement, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section may be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

(Authority: 31 U.S.C. 3803(b), (c))

§ 33.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 33.8.

(b) The complaint must state:

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from those claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the com-

plaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 33.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of the regulations in this part.

(Authority: 31 U.S.C. 3803(a))

§ 33.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by:

(1) Affidavit of the individual serving the complaint by delivery;

(2) An acknowledged United States Postal Service return receipt card; or

(3) Written acknowledgment of receipt by the defendant or his representative.

(Authority: 31 U.S.C. 3802(d))

§ 33.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer is deemed to be a request for hearing.

(b) In the answer, the defendant:

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing official shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in § 33.11 for good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

(Authority: 31 U.S.C. 3803(d)(2), 3809)

§ 33.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 33.9(a), the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on defendant in the manner prescribed in § 33.8, a notice that an initial decision will be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true and, if those facts establish liability under § 33.3, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision becomes final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision must be stayed pending the ALJ's decision on the motion.

(f) If, on such a motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision under paragraph (c) of this section, if such a decision has been issued, and shall gran the defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 33.38.

(h) The defendant may appeal to the Department head the decision denying a motion to reopen by filing a notice of appeal with the Department head within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal stays the initial decision until the Department head decides the issue.

(i) If the defendant files a timely notice of appeal with the Department head, the ALJ shall forward the record of the proceeding to the Department head.

(j) The Department head decides expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the Department head decides that extraordinary circumstances excuse the defendant's failure to file a timely answer, the Department head remands the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the Department head decides that the defendant's failure to file a timely answer is not excused, the Department head reinstates the initial decision of the ALJ, which becomes final and binding upon the parties 30 days after the Department head issues that decision.

(Authority: 31 U.S.C. 3809)

§ 33.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

(Authority: 31 U.S.C. 3803(d)(2); 3809)

§ 33.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by § 33.8. At the same time, the ALJ shall send a copy of the notice to the representative for the Government.

(b) The notice must include:

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

(Authority: 31 U.S.C. 3803(g)(2)(A))

§ 33.13 Parties to the hearing.

(a) The parties to the hearing are the defendant and the Department.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

(Authority: 31 U.S.C. 3803(g)(2))

§ 33.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the Department who takes part in investigating, preparing, or presenting a particular case may not, in that case or a factually related case:

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the Department head, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ may not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the Department, including in the offices of either the investigating official or the reviewing official.

(Authority: 31 U.S.C. 3809(l)(2))

§ 33.15 Ex parte contacts.

No party or person (except employees of the ALJ's office) may communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

(Authority: 31 U.S.C. 3803(g)(1)(A))

§ 33.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. That motion must be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) The motion and affidavit must be filed promptly upon the party's discovery of reasons requiring disqualification, or the objections are deemed waived.

(d) The affidavit must state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of those facts. It must be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of the motion and affidavit, the ALJ shall not proceed further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case must be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the Department head may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

(Authority: 31 U.S.C. 3803(g)(2)(G))

§ 33.17 Rights of parties.

Except as otherwise limited by this part, all parties may:

(a) Be accompanied, represented, and advised by a representative (as defined in § 33.2);

(b) Participate in any conference held by the ALJ:

(c) Conduct discovery under § 33.21;

(d) Agree to stipulations of fact or law, which must be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

(Authority: 31 U.S.C. 3803(g) (2) (E), (F), (3)(B)(ii))

§ 33.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to:

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Disqualify a non-attorney representative (designated as described in the § 33.2 definitions of "representative") if the ALJ determines that the representative is incapable of rendering reasonably effective assistance;

(3) Continue or recess the hearing in whole or in part for a reasonable period of time;

(4) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(5) Administer oaths and affirmations;

(6) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(7) Rule on motions and other procedural matters;

(8) Regulate the scope and timing of discovery;

(9) Regulate the course of the hearing and the conduct of representatives and parties;

(10) Examine witnesses;

(11) Receive, rule on, exclude, or limit evidence;

(12) Upon motion of a party, take official notice of facts;

(13) Upon motion of a party, decide cases, in whole or in part, by summary judgment if there is no disputed issue of material fact;

(14) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(15) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

(Authority: 31 U.S.C. 3803(g))

§ 33.19 Prehearing conferences.

(a) The ALJ may schedule perhearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one perhearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues.

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement.

(3) Stipulations, admissions of fact or as to the contents and authenticity of documents.

(4) Whether the parties can agree to submission of the case on a stipulated record.

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument.

(6) Limitation of the number of witnesses.

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits.

(8) Discovery.

(9) The time and place for the hearing.

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

(Authority: 31 U.S.C. 3803(g))

§ 33.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 33.4(b) are based, unless those documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of the documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 33.5 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 33.9.

(Authority: 31 U.S.C. 3803(g)(3)(B)(ii), 3803(e))

§ 33.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying.

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact.

(3) Written interrogatories.

(4) Depositions.

(b) For the purpose of this section and §§ 33.22 and 33.23, the term "documents" includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained in this part may be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion or a motion for protective order, or both, as provided in § 33.24.

(3) The ALJ may grant a motion for discovery only if he finds that the discovery sought:

(i) Is necessary for the expeditious, fair, and reasonable determination of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 33.24.

(Authority: 31 U.S.C. 3803(a)(3)(B)(ii))

(e) *Depositions.* (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena must specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 33.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking a verbatim transcript of the deposition, which the party shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

(Authority: 31 U.S.C. 3803(g)(3)(B)(ii))

§ 33.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 33.33(b). At the time these documents are exchanged, any party that is permitted by the ALJ to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, shall provide each other party with a copy of the specific pages of the transcript it intends to introduce.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided in paragraph (a) of this Section unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section are deemed to be authentic for the purpose of admissibility at the hearing.

(Authority: 31 U.S.C. 3803(g)(2))

§ 33.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. The request must specify any documents to be produced and must designate the witnesses and describe their address and location with sufficient particularity to permit the witnesses to be found.

(d) The subpoena must specify the time and place at which a witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 33.8. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if is is less then ten days after service.

(Authority: 31 U.S.C. 3804(b))

§ 33.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may take any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had.

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place.

(3) That the discovery may be had only through a method of discovery other than that requested.

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters.

(5) That the discovery be conducted with no one present except persons designated by the ALJ.

(6) That the contents of discovery or evidence be sealed.

(7) That a deposition after being sealed be opened only by order of the ALJ.

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way.

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

(Authority: 31 U.S.C. 3803(g)(3)(B)(ii))

§ 33.25 Fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage must accompany the subpoena when served, except that if a subpoena is issued on behalf of the authority, a check for witness fees and mileage need not accompany the subpoena.

(Authority: 31 U.S.C. 3804(b))

§ 33.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ must include an original and two copies.

(2) Every pleading and paper filed in the proceeding must contain a caption setting for the title of the action, the case number assigned by the ALJ, and a designation of the paper (*e.g.*, motion to quash subpoena).

(3) Every pleading and paper must be signed by, and must contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of the document on every other party. Service upon any party of any document other than those required to be served as prescribed in § 33.8 shall be made by delivering a copy, or by placing a copy of the document in the United States

best copy available

mail, postage prepaid and addressed, to the party's last known address. If a party is represented by a representative, service must be made upon the representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, is proof of service.

(Authority: 31 U.S.C. 3803(b)(3)(A))

§ 33.27 Computation of time.

(a) In computing any period of time under this part or in an order issued under this part, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which event it includes the next business day.

(b) If the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal Government are excluded from the computation.

(c) If a document has been served or issued by placing it in the mail, an additional five days is added to the time permitted for any response.

(Authority: 31 U.S.C. 3809)

§ 33.28 Motions.

(a) Any application to the ALJ for an order or ruling must be by motion. Motions must state the relief sought, the authority relied upon, and the facts alleged, and must be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions must be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to the motion.

(d) The ALJ may not grant a written motion before the time for filing responses to the motion has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny the motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

(Authority: 31 U.S.C. 3803(g)(3)(A))

§ 33.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section must reasonably relate to the severity and nature of the failure or misconduct.

(c) If a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with the order from introducing evidence concerning, or otherwise relying upon testimony relating to, the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with the request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief, or other document that is not filed in a timely fashion.

(Authority: 31 U.S.C. 3803(g)(2))

§ 33.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine

ether the defendant is liable for a
il penalty or assessment under
3.3 and, if so, the appropriate
ount of the civil penalty or assess-
ent considering any aggravating or
tigating factors.

b) The Department shall prove a
fendant's liability and any aggravat-
g factors by a preponderance of the
idence.

c) The defendant shall prove any
firmative defenses and any mitigat-
g factors by a preponderance of the
idence.

d) The hearing must be open to the
blic unless otherwise ordered by the
J for good cause shown.

thority: 31 U.S.C. 3803 (f), (g)(2))

3.31 Determining the amount of penalties and assessments.

a) In determining an appropriate
ount of civil penalties and assess-
ents, the ALJ and the Department
ad, upon appeal, evaluate any cir-
mstances that mitigate or aggravate
e violation and articulate in their
inions the reasons that support the
nalties and assessments they
pose. Because of the intangible
sts of fraud, the expense of investi-
ting fraudulent conduct, and the
ed to deter others who might be
nilarly tempted, ordinarily double
mages and a significant civil penalty
imposed.

(b) Although not exhaustive, the fol-
wing factors are among those that
ay influence the ALJ and the De-
rtment head in determining the
ount of penalties and assessments
impose with respect to the miscon-
ct (*i.e.*, the false, fictitious, or fraud-
ent claims or statements) charged in
e complaint:

(1) The number of false, fictitious,
fraudulent claims or statements.

(2) The time period over which such
aims or statements were made.

(3) The degree of the defendent's
lpability with respect to the miscon-
ct.

(4) The amount of money or the
lue of the property, services, or ben-
it falsely claimed.

(5) The value of the Government's
tual loss as a result of the miscon-
ct, including foreseeable consequential damages and the costs of investigation.

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss.

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs.

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct.

(9) Whether the defendant attempted to conceal the misconduct.

(10) The degree to which the defendant has involved others in the misconduct or in concealing it.

(11) If the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude the misconduct.

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct.

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers.

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions.

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly.

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section may be construed to limit the ALJ or the Department head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

(Authority: 31 U.S.C. 3803(a)(2) (e), (f))

§ 33.32 Location of hearing.

(a) The hearing may be held:

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party must have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing must be held at the place and at the time ordered by the ALJ.

(Authority: 31 U.S.C. 3803(g)(4))

§ 33.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing must be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of the witness, in a manner that allows sufficient time for other parties to subpoena the witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts must be exchanged as provided in § 33.22(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination must be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the party *pro se* or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

(Authority: 31 U.S.C. 3803(g)(2)(E); 3809))

§ 33.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ is not bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence if appropriate, *e.g.*, to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighted by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(3) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement are inadmissible to the extend provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All Documents and other evidence offered or taken for the record must be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 33.24.

(Authority: 31 U.S.C. 3803(f)(g)(2)(E))

§ 33.35 The record.

(a) The hearing must be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(Authority: 31 U.S.C. 3803 (f))

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Department head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 33.24.

(Authority: 5 U.S.C. App. 2, section 11)

§ 33.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing these briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. The briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

(Authority: 31 U.S.C. 3803 (g)(1)(2)(E))

§ 33.37 Initial decision.

(a) the ALJ shall issue an initial decision, based only on the record, that contains findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact must include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions of the complaint, violate § 33.3.

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that the ALJ finds in the case, such as those described in § 33.31.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the Department head. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reasons for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the Department head, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the Department head and shall be final and binding on the parties 30 days after it is issued by the ALJ.

(Authority: 31 U.S.C. 3803(h)(i))

§ 33.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt is presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every motion under paragraph (a) of this section must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. The motion must be accompanied by a supporting brief.

(c) Responses to the motion are allowed only upon request to the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the Department head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the Department head in accordance with § 33.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the Department head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the Department head in accordance with § 33.39.

(Authority: 31 U.S.C. 3809)

§ 33.39 Appeal to Department head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal the decision to the Department head by filing a notice of appeal with the Department head in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues a final decision. However, if another party files a motion for reconsideration under § 33.38, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The Department head may extend the initial 30-day period for an additional 30 days if the defendant files with the Department head a request for an extension within the initial 30-day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the Department head, and the time for filing motions for reconsideration under § 33.38 has expired, the ALJ shall forward the record of the proceeding to the Department head.

(d) A notice of appeal must be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the Department head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the Department head does not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the Department head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present that evidence at the hearing, the Department head shall remand the matter to the ALJ for consideration of the additional evidence.

(j) The Department head affirms, reduces, reverses, compromises, remands, or settles any penalty or assessment, determined by the ALJ in any initial decision.

(Authority: 31 U.S.C. 3803(i))

(k) The Department head promptly serves each party to the appeal with a copy of the decision of the Department head and a statement describing the right of any person determined to be liable for a penalty or assessment to seek judicial review.

(Authority: 31 U.S.C. 3803(i)(2))

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805, after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the Department head serves the defendant with a copy of the Department head's decision, a determination that a defendant is liable under § 33.3 is final and is not subject to judicial review.

(Authority: 31 U.S.C. 3805(a)(2))

§ 33.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the Department head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the Department head stays the process immediately. The Department head orders the process resumed only upon receipt of the written authorization of the Attorney General.

(Authority: 31 U.S.C. 3803(b)(3))

§ 33.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the Department head.

(b) No administrative stay is available following a final decision of the Department head.

(Authority: 31 U.S.C. 3809)

§ 33.42 Judicial review.

Section 3805 of Title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the Department head imposing penalties or assessments under this part and specifies the procedures for the review.

(Authority: 31 U.S.C. 3805)

§ 33.43 Collection of civil penalties and assessments.

Section 3806 and 3808(b) of Title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for those actions.

(Authority: 31 U.S.C. 3808(b))

§ 33.44 Right to administrative offset.

The amount of any penalty or assessment that has become final, or for which a judgment has been entered under § 33.42 or § 33.43, or any amount agreed upon in a compromise or settlement under § 33.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be under this section against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

(Authority: 31 U.S.C. 3806)

§ 33.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part are deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

(Authority: 31 U.S.C. 3807(b))

§ 33.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(Authority: 31 U.S.C. 3809)

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(Authority: 31 U.S.C. 3803(j))

(c) The Department head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under § 33.42 or during the pendency of any action to collect penalties and assessments under § 33.43.

(Authority: 31 U.S.C. 3803(i)(2)(C))

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 33.42 or of any action to recover penalties and assessments under 31 U.S.C. § 3806.

(Authority: 31 U.S.C. 3806(f))

(e) The investigating official may recommend settlement terms to the reviewing official, the Department head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Department head, or the Attorney General, as appropriate.

(Authority: 31 U.S.C. 3809)

(f) Any compromise or settlement must be in writing.

(Authority: 31 U.S.C. 3809)

§ 33.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 33.8 within six years after the date on which the claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under § 33.10(b) is deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

(Authority: 31 U.S.C. 3808)

PART 35—TORT CLAIMS AGAINST THE GOVERNMENT

Subpart A—General

Sec.
35.1 Scope of regulations.

Subpart B—Procedures

35.2 Administrative claim; when presented; place of filing.
35.3 Administrative claim; who may file.
35.4 Administrative claim; evidence and information to be submitted.
35.5 Investigation of claims.
35.6 Final denial of claim.
35.7 Payment of approved claims.
35.8 Release.
35.9 Penalties.
35.10 Limitation on Department's authority.

AUTHORITY: Sec. 1(a), 80 Stat. 306; 28 U.S.C. 2672; 28 CFR, Part 14.

SOURCE: 45 FR 30834, May 9, 1980, unless otherwise noted.

Subpart A—General

§ 35.1 Scope of regulations.

The regulations in this part shall apply only to claims asserted under the Federal Tort Claims Act, as amended, 28 U.S.C. sections 2671-2680, for money damages against the United States for damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Department of Education while acting within the scope of his office or employment.

Subpart B—Procedures

§ 35.2 Administrative claim; when presented; place of filing.

(a) For purposes of the regulations in this part, a claim shall be deemed to have been presented when the Department of Education receives, at a place designated in paragraph (b) of this section, an executed Standard Form 95 or other written notification of an incident accompanied by a claim for money damages in a sum certain for damage to or loss of property, for personal injury, or for death, alleged to have occurred by reason of the incident. A claim which should have been presented to the Department but which was mistakenly addressed to or filed with another Federal agency, shall be deemed to be presented to the Department as of the date that the claim is received by the Department. A claim mistakenly addressed to or filed with the Department shall forthwith be transferred to the appropriate Federal agency, if ascertainable, or returned to the claimant.

(b) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final action by the Secretary or prior to the exercise of the claimant's option to bring suit under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the Department shall have 6 months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of an amendment.

(c) Forms may be obtained and claims may be filed, with the Department of Education Claims Officer, Washington, D.C. 20202.

§ 35.3 Administrative claim; who may file.

(a) A claim for injury to or loss of property may be presented by the owner of the property interest which is the subject of the claim, his duly authorized agent, or his legal representative.

(b) A claim for personal injury may be presented by the injured person, his duly authorized agent, or his legal representative.

(c) A claim based on death may be presented by the executor or administrator of the decedent's estate or by any other person legally entitled to assert such a claim under applicable state law.

(d) A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the insurer or the insured individually, as their respective interests appear, or jointly. Whenever an insurer presents a claim asserting the rights of a subrogee, he shall present with his claim appropriate evidence that he has the rights of a subrogee.

(e) A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

§ 35.4 Administrative claim; evidence and information to be submitted.

(a) *Death.* In support of a claim based on death, the claimant may be required to submit the following evidence or information:

(1) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent.

(2) Decedent's employment or occupation at time of death, including his monthly or yearly salary or earnings (if any), and the duration of his last employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of his death.

(4) Degree of support afforded by the decedent to each survivor dependent upon him for support at the time of his death.

(5) Decedent's general physical and mental condition before death.

(6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payments for such expenses.

(7) If damages for pain and suffering prior to death are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain and the decedent's physical condition in the interval between injury and death.

(8) Any other evidence or information which may have a bearing on either the responsibility of the United States for the death or the damages claimed.

(b) *Personal injury.* In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed or designated by the Department. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that claimant has, upon request, furnished the report referred to in the first sentence of this paragraph and has made or agrees to make available to the Department any other physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of his claim.

(2) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses.

(3) If the prognosis reveals the necessity for future treatment, a statement of expected duration of and expenses for such treatment.

(4) If a claim is made for loss of time from employment, a written statement

from his employer showing actual time lost from employment, whether he is a full or part-time employee, and wages or salary actually lost.

(5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amount of earnings actually lost.

(6) Any other evidence or information which may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed.

(c) *Property damage.* In support of a claim for damage to or loss of property, real or personal, the claimant may be required to submit the following evidence or information:

(1) Proof of ownership.

(2) A detailed statement of the amount claimed with respect to each item of property.

(3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price, market value of the property as of date of damage, and salvage value, where repair is not economical.

(5) Any other evidence or information which may have a bearing either on the responsibility of the United States for the injury to or loss of property or the damages claimed.

(d) *Time limit.* All evidence required to be submitted by this section shall be furnished by the claimant within a reasonable time. Failure of a claimant to furnish evidence necessary to a determination of his claim within three months after a request therefor has been mailed to his last known address may be deemed an abandonment of the claim. The claim may be thereupon disallowed.

§ 35.5 Investigation of claims.

When a claim is received, the Department will make such investigation as may be necessary or appropriate for a determination of the validity of the claim.

§ 35.6 Final denial of claim.

(a) Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with the Department's action, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification.

(b) Prior to the commencement of suit and prior to the expiration of the 6-month period after the date of mailing, by certified or registered mail of notice of final denial of the claim as provided in 28 U.S.C. 2401(b), a claimant, his duly authorized agent, or legal representative, may file a written request with the Department for reconsideration of a final denial of a claim under paragraph (a) of this section. Upon the timely filing of a request for reconsideration the Department shall have 6 months from the date of filing in which to make a final disposition of the claim and the claimant's option under 28 U.S.C. 2675(a) to bring suit shall not accrue until 6 months after the filing of a request for reconsideration. Final Department action on a request for reconsideration shall be effected in accordance with the provisions of paragraph (a) of this section.

§ 35.7 Payment of approved claims.

(a) Upon allowance of his claim, claimant or his duly authorized agent shall sign the voucher for payment, Standard Form 1145, before payment is made.

(b) When the claimant is represented by an attorney, the voucher for payment (SF 1145) shall designate both the claimant and his attorney as "payees." The check shall be delivered to the attorney whose address shall appear on the voucher.

§ 35.8 Release.

Acceptance by the claimant, his agent or legal representative, of any award, compromise or settlement made hereunder, shall be final and conclusive on the claimant, his agent or legal representative and any other person on whose behalf or for whose benefit the claim has been presented, and shall constitute a complete release of any claim against the United States and against any employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 35.9 Penalties.

A person who files a false claim or makes a false or fraudulent statement in a claim against the United States may be liable to a fine of not more than $10,000 or to imprisonment of not more than 5 years, or both (18 U.S.C. 287.1001), and, in addition, to a forfeiture of $2,000 and a penalty of double the loss or damage sustained by the United States (31 U.S.C. 231).

§ 35.10 Limitation on Department's authority.

(a) An award, compromise or settlement of a claim hereunder in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. For the purposes of this paragraph, a principal claim and any derivative or subrogated claim shall be treated as a single claim.

(b) An administrative claim may be adjusted, determined, compromised or settled hereunder only after consultation with the Department of Justice when, in the opinion of the Department:

(1) A new precedent or a new point of law is involved; or

(2) A question of policy is or may be involved; or

(3) The United States is or may be entitled to indemnity or contribution from a third party and the Department is unable to adjust the third party claim; or

(4) The compromise of a particular claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed $25,000.

(c) An administrative claim may be adjusted, determined, compromised or settled only after consultation with the Department of Justice when it is learned that the United States or an employee, agent or cost plus contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction.

PART 50—U.S. EXCHANGE VISITOR PROGRAM—REQUEST FOR WAIVER OF THE TWO-YEAR FOREIGN RESIDENCE REQUIREMENT

Sec.

50.1 Authority.
50.2 Exchange Visitor Waiver Review Board.
50.3 Policy.
50.4 Procedure for submission of application to ED.
50.5 Personal hardship, persecution and visa extension considerations.
50.6 Release from foreign government.

AUTHORITY: 75 Stat. 527, 22 U.S.C. 2451 et seq.; 84 Stat. 116, 8 U.S.C. 1182(e).

SOURCE: 45 FR 30836, May 9, 1980, unless otherwise noted.

§ 50.1 Authority.

Under the authority of the Mutual Educational and Cultural Exchange Act of 1961 (75 Stat. 527) and the Immigration and Nationality Act as amended (84 Stat. 116), the Department of Education is an "interested United States Government agency" with the authority to submit requests through the Department of State to the Attorney General for the waiver of the two-year foreign residence requirement for exchange visitors under the Mutual Educational and Cultural Exchange Program.

§ 50.2 Exchange Visitor Waiver Review Board.

(a) *Establishment.* The Exchange Visitor Waiver Review Board is established for the purpose of carrying out the Department's responsibilities under the Exchange Visitor Program.

(b) *Functions.* The Exchange Visitor Waiver Review Board is responsible for making thorough and equitable evaluations of applications for waiver submitted to the Department and for rendering recommendations to the Department of State on such applications on behalf of the Secretary.

(c) *Membership.* The Exchange Visitor Waiver Review Board consists of not less than five members, of whom no less than three shall consider any particular application. The Secretary designates an ex officio member of the

Board who serves as Chairman of the Board. The Chairman may designate a staff member of the Office of the Secretary to serve as member and Chairman in his absence. Two regularly assigned members are appointed by the Secretary. When, in the Board's judgment, it is required, the Board may obtain expert advisory opinion from other sources.

§ 50.3 Policy.

(a) *Criteria and information pertaining to waivers.* The Department of Education has a stringent and restrictive policy with respect to requesting waivers for foreign visitors under the exchange visitor program. Each case is evaluated individually on the basis of the facts available. The general criteria which are applied are:

(1) The program or activity of the applicant institution or organization in which the exchange visitor is employed must be of high priority and significance in an area of interest to the Department. The Waiver Review Board will not request a waiver when the documentation clearly demonstrates that the problem is primarily one of recruitment in order to overcome a local community or institutional manpower shortage, however serious.

(2) The exchange visitor must be needed as an integral part of the program or activity, or of an essential component thereof. The Board will not request a waiver when the principal problem appears to be one of administrative or program inconvenience to the institution or other employer.

(3) The exchange visitor must possess outstanding qualifications, training, and experience. The Board will not request a waiver simply because an individual has specialized training or experience or is occupying a senior staff position in a university or other institution.

(b) *Waivers for members of exchange visitor's family.* (1) Where a decision is made to request a waiver for an exchange visitor, a waiver will also be requested for the spouse and children, if any, if they are also subject to the foreign residence requirement.

(2) In cases of married couples where one spouse is an exchange visitor, the subject of a waiver application, and the other is a citizen of the United States or resident alien a waiver will be requested for the exchange visitor if either spouse is found to meet the strict criteria given above.

§ 50.4 Procedure for submission of application to ED.

(a) The applicant institution (educational institution, corporation, etc.) should send a completed application to the Exchange Visitor Waiver Review Board, Department of Education, Washington, D.C. 20202. Application forms and information may be obtained from the Executive Secretary. The application must be signed by an authorized official of the applicant institution. The information should describe in detail the circumstances of the case involved. This should include but not be limited to:

(1) A complete description of the program or activity in which the exchange visitor is engaged; including factual evidence of the way in which the program or activity serves the national or international public interest.

(2) His or her relationship to the program, particular contribution, and other responsibilities, if any.

(3) The probable future of the program if the waiver is not granted; including specific evidence showing how the loss of the exchange visitor's services would seriously restrain the initiation, continuation, completion, or success of the program or activity, or a major part thereof.

(4) The applicant institution's long-range plans for the exchange visitor, and ways in which the visitor will contribute in the future to the activities in which he or she is employed.

(5) Specific evidence of a demonstrated unique capability of the exchange visitor to make essential contributions to the program or activity over a long period of time.

(6) The exchange visitor's curriculum vitae, bibliography, data and place of birth, present citizenship, date and port of entry and current address.

(7) Any other facts considered germane.

(b) Since the formal filing of an application for waiver with the Immigration and Naturalization Service automatically terminates the applicant's exchange visitor status, it is permissible to obtain the decision of the Exchange Visitor Waiver Review Board before filing with the Immigration and Naturalization Service.

§ 50.5 Personal hardship, persecution and visa extension considerations.

(a) The Department is not responsible for considering applications for waivers based on:

(1) Exceptional hardship to the exchange visitor's American or legally resident alien spouse or child; or

(2) The alien's unwillingness to return to the country of his/her nationality or last residence on the grounds that he/she or family members would be subject to persecution on account of race, religion or political opinion.

(b) Likewise, this Department is not responsible for considering requests for extension of visa.

(c) Inquiries concerning the above should be directed to the District Office of the Immigration and Naturalization Service which has jurisdiction over the exchange visitor's place of residence in the U.S.

§ 50.6 Release from foreign government.

The Department of State has the responsibility to consider applications for waivers which are based on a notification from the exchange visitor's country that it has no objection to a waiver (22 CFR 63.31).

PART 60—INDEMNIFICATION OF DEPARTMENT OF EDUCATION EMPLOYEES

Sec.

60.1 What are the policies of the Department regarding indemnification?
60.2 What procedures apply to requests for indemnification?

AUTHORITY: 20 U.S.C. 3411, 3461, 3471, and 3474.

SOURCE: 54 FR 7148, Feb. 16, 1989, unless otherwise noted.

§ 60.1 What are the policies of the Department regarding indemnification?

(a) (1) The Department of Education may indemnify, in whole or in part, an employee for any verdict, judgment, or other monetary award rendered against the employee if—

(i) The conduct giving rise to the verdict, judgment, or award occurred within the scope of his or her employment with the Department; and

(ii) The indemnification is in the interest of the United States, as determined by the Secretary.

(2) The regulations in this part apply to an action pending against an ED employee as of March 30, 1989, as well as to any action commenced after that date.

(3) As used in this part, the term "employee" includes—

(i) A present or former officer or employee of the Department or of an advisory committee to the Department, including a special Government employee;

(ii) An employee of another Federal agency on detail to the Department; or

(iii) A student volunteer under 5 U.S.C. 3111.

(4) As used in this part the term "Secretary" means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

(b) (1) The Department may pay, in whole or in part, to settle or compromise a personal damage claim against an employee if—

(i) The alleged conduct giving rise to the personal damage claim occurred within the scope of employment; and

(ii) The settlement or compromise is in the interest of the United States, as determined by the Secretary.

(2) Payment under paragraph (b)(1) of this section may include reimbursement, in whole or in part, of an employee for prior payment made by the employee under a settlement or compromise that meets the requirements of this section.

(c) The Department does not indemnify or settle a personal damage claim before entry of an adverse verdict, judgment, or monetary award unless the Secretary determines that exceptional circumstances justify the earlier indemnification or settlement.

(d) Any payment under this part, either to indemnify a Department of Education employee or to settle a personal damage claim, is contingent upon the availability of appropriated funds.

(Authority: 20 U.S.C. 3411, 3461, 3471, and 3474)

§ 60.2 What procedures apply to requests for indemnification?

(a) When an employee of the Department of Education becomes aware that an action has been filed against the employee in his or her individual capacity as a result of conduct taken within the scope of his or her employment, the employee shall immediately notify the head of his or her principal operating component and shall cooperate with appropriate officials of the Department in the defense of the action.

(b) As part of the notification in paragraph (a) of this section or at a later time, the employee may request—

(1) Indemnification to satisfy a verdict, judgment, or award entered against the employee; or

(2) Payment to satisfy the requirements of a settlement proposal.

(c) (1) The employee's request must be in writing to the head of his or her principal operating component and must be accompanied by copies of the complaint and other documents filed in the action, including the verdict, judgment, award, settlement, or settlement proposal, as appropriate.

(2) (i) As used in this section, the term "principal operating component" means an office in the Department headed by an Assistant Secretary, a Deputy Under Secretary, or an equivalent departmental officer who reports directly to the Secretary.

(ii) The term also includes the Office of the Secretary and the Office of the Under Secretary.

(d) The head of the employee's principal operating component submits to the General Counsel, in a timely manner, the request, together with a recommended disposition of the request.

(e) The General Counsel forwards to the Secretary for decision—

(1) The employee's request;

(2) The recommendation of the head of the employee's principal operating component; and

(3) The General Counsel's recommendation.

(Authority: 20 U.S.C. 3411, 3461, 3471, and 3474)

PART 73—STANDARDS OF CONDUCT

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73.50 Disciplinary proceedings for post-employment conflicts of interests.
APPENDIX TO PART 73—CODE OF ETHICS FOR GOVERNMENT SERVICE

AUTHORITY: 5 U.S.C. Appendix 4, 5; 18 U.S.C. 201-209; 28 U.S.C. 535; E.O. 11222 of May 8, 1965, 3 CFR, 1964-1965 Comp., p. 306; 5 CFR 735.104; 5 CFR 735.201(a); 5 CFR 737.27; 5 CFR 738.103, unless otherwise noted.

SOURCE: 54 FR 5026, Jan. 31, 1989, unless otherwise noted.

Subpart A—General Provisions

§ 73.1 Standards of conduct.

(a) The Secretary finds that—

(1) The maintenance of high standards of honesty, integrity, impartiality, and conduct by employees is essential to assure the proper performance of Government business and the maintenance of confidence by citizens in their Government; and

(2) The avoidance of misconduct and conflicts of interest on the part of employees through informed judgment is indispensable to the maintenance of these standards.

(b) The regulations in this part implement the findings in paragraph (a) of this section by—

(1) Establishing standards of conduct to which each employee must adhere; and

(2) Describing actions the Secretary may take if an employee violates a particular standard.

(Authority: E.O. No. 11222, May 8, 1965, as amended; 5 CFR 735.101, 5 CFR 735.104)

§ 73.2 Definitions.

The following definitions apply to this part:

"Act" means the Ethics in Government Act, as amended.

"Counselor" means—

(a) The person designated by the Secretary to provide interpretation of the standards of conduct and advisory services to Department employees under § 73.4; or

(b) Any deputy counselor designated by the Secretary.

"Day" means calendar day.

"Department" means the United States Department of Education.

"Designated Agency Ethics Official" or "DAEO" means—

(a) The person appointed by the Secretary and charged with—

(1) Ensuring departmental compliance with the requirements of the Ethics in Government Act of 1978, as amended;

(2) Coordinating and managing the Department's ethics program, as described in 5 CFR 738.203; and

(3) Serving as liaison to the Office of Government Ethics with regard to all aspects of the Department's ethics program.

(b) An alternate DAEO designated by the Secretary.

"Employee."

(a) This term means—

(1) Any officer or employee of the Department or of an advisory committee to the Department; or

(2) A special Government employee, unless specifically provided otherwise.

(b) The term does not mean an independent contractor under a personal services contract.

"Foreign government" means—

(a) Any unit of foreign governmental authority, including any foreign national, State, local, or municipal government;

(b) Any international or multinational organization whose membership is composed of any unit of foreign government described in paragraph (a) of this definition; or

(c) A person acting as agent or representative of any unit or organization described in paragraph (a) or (b) of this definition.

(Authority: 5 U.S.C. 7342)

"Member of the employee's immediate household" means a resident of the employee's household who is related to the employee by blood or law.

"Nominal" means $25.00 or less, unless the Counselor, in a given case, approves a higher amount.

"Person" means an individual, corporation, company, association, firm, partnership, society, joint stock company, or any other organization or institution.

"Principal officer" means an individual who heads a principal operating component or an official of the principal operating component acting for the principal officer under a delegation of authority.

"Principal operating component" means an office in the Department headed by an Assistant Secretary, a Deputy Under Secretary, or an equivalent departmental officer who reports directly to the Secretary.

"Secretary" means the Secretary of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

"Senior employee" means—

(a) An employee compensated at a rate of pay specified for Executive Schedule positions under 5 U.S.C., chapter 53, subchapter II or at a comparable or greater rate of pay under other authority; or

(b) An employee in a position designated by the Director of the Office of Government Ethics as involving significant decision-making or supervisory responsibility, in accordance with 18 U.S.C. 207(d)(1)(C).

"Special Government employee."

(a) This term means an employee who is retained, designated, appointed, or employed by the Department to perform temporary duties—

(1) On a full-time or intermittent basis;

(2) With or without compensation; and

(3) For not more than 130 days during any period of 365 consecutive days.

(b) The term includes a consultant, expert, or member of a Department advisory committee who meets the conditions of paragraph (a) of this definition.

"Tax-exempt organization" means an organization exempt from taxes under section 501(c)(3) of the Internal Revenue Code, relating to non-profit educational, religious, charitable, and other specified organizations that may not engage in propaganda or legislative lobbying as a substantial part of their activities or participate in political campaigns.

(Authority: 5 CFR 735.104; 18 U.S.C. 202; 26 U.S.C. 501(c)(3))

§ 73.3 Employee notification.

(a) The Secretary provides a copy of this part to each employee.

(b) The Secretary makes available for inspection by Department employees copies of Executive orders, regulations, and statutes referred to in this part, together with related explanatory materials.

(Authority: 5 CFR 735.104)

§ 73.4 Interpretation, advisory services, and counseling.

(a) An employee shall become familiar with the provisions of this part.

(b) In any case of doubt as to the proper application or interpretation of a provision of this part, the employee may consult with the Counselor.

(c) On an annual basis or, in the case of a new employee, at the time of entrance on duty, the Secretary notifies employees of the availability of counseling services.

(d) The Secretary, as appropriate, issues notices—

(1) Containing more specific guidance on practices and procedures to carry out this part; and

(2) Serving to remind employees of their responsibilities and of particular prohibitions under this part.

(Authority: 5 CFR 735.105)

§ 73.5 Disciplinary and other remedial action.

(a) A violation of any provision of this part by an employee may be cause for appropriate disciplinary action, which may be in addition to any penalties prescribed by law.

(b) If, after considering the employee's explanation for any conflict or apparent conflict of interest, or any other violation of this part, the Secretary decides that remedial action is required, the Counselor ensures that the employee and his or her principal officer take immediate action to end the conflict or apparent conflict of interest or other violation.

(c)(1) Whether disciplinary or otherwise, the remedial action must be in accordance with any applicable laws, Executive orders, and regulations.

(2) Remedial action may include, but is not limited to—

(i) Changes in assigned duties;

(ii) Divestment by the employee of his or her conflicting interest;

(iii) Disciplinary action, including possible removal from the Federal service; or

(iv) Disqualification of the employee for a particular assignment.

(Authority: 5 CFR 735.107)

Subpart B—Conduct and Responsibilities

§ 73.10 General standards of conduct.

(a) In all circumstances an employee shall conduct himself or herself so as to exemplify the highest standards of integrity.

(b) The employee may not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

(c) The employee shall avoid any action, whether or not specifically prohibited by this part, that might result in, or create the appearance of—

(1) Using public office for private gain;

(2) Giving preferential treatment to any person;

(3) Impeding Government efficiency or economy;

(4) Losing complete independence or impartiality;

(5) Making a decision on behalf of the Government outside official channels; or

(6) Affecting adversely the confidence of the public in the integrity of the Government.

(d) The employee shall comply with the "Code of Ethics for Government Service" (House Concurrent Resolution 175, 85th Congress, 2nd Sess. 312), which is attached as an Appendix to this part.

(Authority: 5 CFR 735.201(a))

§ 73.11 Financial interests.

(a) An employee may not—

(1) Have a direct or indirect financial interest that conflicts, or appears to conflict, substantially with the employee's official duties and responsibilities; or

(2) Engage in, directly or indirectly, a financial transaction as a result of, or primarily relying on, information obtained as a Federal employee.

(b) This section does not preclude the employee from having a financial interest or engaging in financial transactions to the same extent as a private citizen not employed by the Federal Government so long as the interest or transaction is not prohibited by law, Executive order, or regulations.

(c) Financial interests of a spouse, minor child, or member of the employee's immediate household are regarded, for purposes of this section, as financial interests of the employee.

(Authority: 5 CFR 735.204, 735.407)

Subpart C—Gifts, Travel, and Outside Activity

§ 73.20 Gifts, entertainment, and favors.

(a) *General Prohibitions.* (1) Except as provided in paragraph (b) of this section and in § 73.21, an employee may not solicit or accept from a prohibited source—directly or indirectly on his or her own behalf or on behalf of the Department—any gift, gratuity, favor, entertainment, loan, or other thing of monetary value.

(2) For purposes of this section, a "prohibited source" means a person who—

(i) Has, or is seeking to obtain, contractual, grant, or other business or financial relations with the Department;

(ii) Conducts business or financial operations or activities that are regulated by the Department; or

(iii) Has business or financial interests that may be substantially affected by the performance or nonperformance of the employee's official duties.

(b) *Exceptions.* Notwithstanding paragraph (a) of this section, the employee may—

(1) Accept a gift, gratuity, favor, entertainment, loan, or other thing of monetary value from a friend, parent, spouse, child, or other close relative if it is clear that the family or personal relationship involved is the motivating factor;

(2)(i) Accept food or refreshments of nominal value on infrequent occasions—

(A) In the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour at which the employee may properly be in attendance; or

(B) At a widely attended gathering of mutual interest to the Government and industry—such as a reception, seminar, conference, or training session—if attendance at the gathering is approved in advance by the employee's supervisor on the basis that—

(*1*) It is in the Department's interest that the employee attend; and

(*2*) The timing or reasons for the event do not create an appearance of impropriety;

(ii) A meeting under paragraph (b)(2)(i)(A) of this section may include a large group meeting at which the employee is the guest speaker or a working meeting at which food is brought in to facilitate continuance of the work and is not itself the focus of the meeting but does not include a meeting between a small number of individuals at a restaurant or private club at which business may be discussed;

(3) Accept a loan from a bank or other financial institution on customary terms to finance a proper or usual activity of the employee, such as a home mortgage loan; and

(4) Accept unsolicited advertising or promotional material of nominal value, such as a pen, pencil, note pad, or calendar.

(c) *Gifts between employees.* (1)(i) An employee may not solicit contributions from another employee for a gift to a supervisory employee.

(ii) An employee may not accept a gift from an employee who receives less pay than he or she receives.

(iii) An employee may not make a donation as a gift to a supervisory employee.

(2) As used in paragraph (c) of this section, "supervisory employee" means an employee who directly or indirectly supervises or has authority over the soliciting or contributing employee.

(3) Nothing in paragraph (c) of this section prohibits a voluntary gift of nominal value or donation in a nominal amount on a special occasion such as marriage, illness, or retirement.

(d) *Foreign governments.* (1) Except as provided in paragraph (d)(2) of this section, an employee—

(i) May not accept from a foreign government any emolument, office, or title; and

(ii) Shall submit to the DAEO for transmittal to the General Services Administration, for use and disposal as property of the United States, any present, decoration, or other gift that the employee is unable to refuse from a foreign government.

(2) An employee may accept from a foreign government—

(i) Certain gifts of minimal value, as established by regulation (41 CFR Part 101-49);

(ii) Specified military decorations; or

(iii) Payment for travel expenses, to the extent permitted in § 73.21 of this part.

(Authority: U.S. Constitution, Art. 1, sec. 9, para. 8; 5 U.S.C. 7342, 7351; 5 CFR 735.202)

§ 73.21 Acceptance of travel expenses and awards.

(a) *Official travel.* (1) Except as provided in paragraph (a)(2) of this section, an employee may not accept from any source other than the Government payment for travel or expenses incident to travel on official business.

(2) The employee may accept the type of payment referred to in paragraph (a)(1) of this section if—

(i) Acceptance is approved in advance in accordance with Department procedures; and

(ii) The payment is from—

(A) A tax-exempt organization for expenses incident to training or attendance at meetings, subject to the provisions of 5 U.S.C. 4111 and 5 CFR 410.702;

(B) A donor whose donation is accepted under section 421 of the Department of Education Organization Act, which contains the Secretary's gift acceptance authority; or

(C) A foreign government for travel taking place entirely outside the United States, subject to the restrictions of 5 U.S.C. 7342.

(3) The employee may accept payment in cash only if it is the type of payment referred to in paragraph

(a)(2)(ii)(A) or (a)(2)(ii)(C) of this section.

(b) *Non-official travel.* (1) An employee may accept payment in cash or kind for travel or expenses incident to travel of a non-official nature if acceptance is compatible with the other standards contained in this part, including, for example, the provisions on accepting gifts in § 73.20(a).

(2)(i) The employee should refer to his or her supervisor any question as to whether the employee's travel is of an official or non-official nature.

(ii) In determining whether the employee's travel is of an official or non-official nature, the supervisor considers such factors as the relationship of the trip's purpose to the employee's official duties, the Department's interest in the employee's participation in the activity for which travel is taken, and the employee's independent interest in the activity or relationship to the sponsor of the trip.

(3)(i) Unless it raises a question under paragraph (b) (1) or (2) of this section, the employee's acceptance of payment for non-official travel is not subject to approval procedures referenced in paragraph (a) of this section.

(ii) However, the non-official travel may be subject to prior approval as an outside activity under § 73.22.

(c) *Awards.* An employee may accept an award for a meritorious public contribution or achievement from a charitable, religious, professional, social, fraternal, non-profit educational, recreational, public service, or civic organization if acceptance of the award is compatible with the other standards in this part.

(Authority: 5 U.S.C. 4111; 5 CFR 735.203)

§ 73.22 Outside employment and other activities.

(a) *General.* (1) An employee may not engage in outside employment or other outside activity incompatible with the full and proper discharge of the duties and responsibilities of his or her Government employment.

(2) Incompatible activities include, but are not limited to—

(i) Acceptance of a fee, compensation, gift, payment of expenses, or any other thing of monetary value in circumstances in which acceptance would—

(A) Result in, or create the appearance of, a conflict of interest; or

(B) Otherwise violate the standards in this part;

(ii) Outside employment or other outside activity that tends to impair the employee's mental or physical capacity to perform assigned Government duties in an acceptable manner; or

(iii) Outside activity that—

(A) Conflicts with the interests of the Government; or

(B) Could reasonably be construed by the public to be official acts of the Government.

(b) *Prior approval.* (1) Except as provided in paragraph (b)(2) of this section, an employee who intends to engage in outside employment or in other outside activity shall obtain prior approval from his or her principal officer in accordance with procedures of the Department.

(2) Prior approval is not required if the outside activity will not—

(i) Be performed during the employee's regular work hours;

(ii) Aggregate 10 or more hours a week;

(iii) Involve public writing or speaking;

(iv) Involve services for a prohibited source, as defined in § 73.20(a)(2), or services that relate to any matters funded by or regulated by another Federal agency; and

(v) Reasonably raise questions under the standards in this part.

(3) The principal officer files in his or her immediate office a record of each approval under this paragraph.

(4) The Secretary issues guidelines giving specific examples of outside activities that are incompatible with Government duties.

(5) The requirement of paragraph (b)(1) of this section does not apply to a special Government employee.

(c) *Disclaimer*—(1) *General.* (i) In engaging in an outside activity—including speaking, teaching, or writing—an employee may not use his or her official title or affiliation with the Department except as provided in paragraph (c)(1)(ii) of this section.

(ii) An employee may mention his or her official title or affiliation with the Department to identify the employee's background or experience in a manner that does not suggest or convey official endorsement of the activity.

(2) *Outside activity related to official duties.* If the employee engages in any outside activity related to his or her official duties or to programs of the Department and if the employee's title and affiliation are used or known by the audience, the employee shall include a disclaimer stating that—

(i) The activity was undertaken by the employee in his or her private capacity; and

(ii) No official support or endorsement by the Department is intended or should be inferred.

(d) *Speaking, teaching, or writing.* (1) Either for or without compensation, the employee may not engage in making speeches, teaching, or writing that is dependent on information obtained as a result of his or her Government employment, unless—

(i) The Government has made the information available to the general public or will make it available on request; or

(ii) The employee receives written approval from an authorized Department official for the use of the information on the basis that the use is in the public interest.

(2) The prohibition in paragraph (d)(1) of this section includes lecturing or writing for the purpose of special preparation of a person or class of persons for an examination of the Office of Personnel Management or the Board of Examiners for the Foreign Service.

(e) *Certain Presidential appointees.* An employee who is a Presidential appointee covered by section 401(a) of E.O. 11222 may not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance if the subject of this activity—

(1) Is devoted substantially to the responsibilities, programs, or operations of the Department; or

(2) Draws substantially on official data or ideas that have not become public information.

(f) *Monetary limitations.* (1)(i) An employee may not accept an honorarium in excess of $2,000 for any appearance, speech, or article.

(ii) The maximum amount permissible under paragraph (f)(1)(i) of this section does not include amounts the employee may accept for actual travel and subsistence expenses for the employee and his or her spouse or aide.

(iii) Any honorarium, or any part thereof, paid by or on behalf of the employee to a charitable organization is deemed not to be accepted for purposes of paragraph (f)(1)(i) of this section.

(2)(i) An employee compensated at a pay grade of GS-16 or above who occupies a full-time PAS position, as defined in paragraph (f)(2)(ii) of this section, may not in any calendar year have outside earned income attributable to that calendar year in excess of 15 percent of the employee's salary.

(ii) As used in paragraph (f)(2)(i) of this section, "PAS position" means a position that is required to be filled by Presidential appointment by and with the advice and consent of the Senate.

(g) *Updates.* If an employee wishes to renew approval of outside employment or other outside activity, the employee must file an annual update for approval by the principal officer in accordance with applicable procedures of the Department.

(Authority: 2 U.S.C. 441i, 5 CFR 735.203, 734.501)

Subpart D—Specific Prohibitions

§ 73.30 Criminal conflict of interest prohibitions.

An employee who violates any of the following prohibitions contained in the Federal criminal code is subject to punishment by fine, imprisonment, or both and to penalties for violating the standards in this section:

(a) *Compensation in matters affecting the Government.* (1) Except as provided by law for the proper discharge of official duties, an employee may not receive or agree to receive directly or indirectly compensation for any service rendered or to be rendered by the employee or another person in relation to any proceeding in which the

Government is a party or has a direct and substantial interest.

(2) As used in paragraph (a)(1) of this section—

(i) The word "receive" also means to ask, demand, solicit, or seek; and

(ii) The word "proceeding" also means application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter before any department, agency, court-martial, or officer or any civil, military, or naval commission.

(Authority: 18 U.S.C. 203)

(b) *Claims against or matters affecting the Government.* (1) Except as provided by law for the proper discharge of official duties, an employee may not—

(i) Act as an agent or attorney for prosecuting any claim against the United States; or

(ii) Act as an agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding in which the United States is a party or has a direct and substantial interest.

(2) As used in paragraph (b)(1) of this section—

(i) The words "prosecuting any claim" also mean receiving any gratuity—or any share of or interest—in a claim for assisting in its prosecution; and

(ii) The word "proceeding" also means application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter.

(Authority: 18 U.S.C. 205)

(c) *Special Government employee.* (1) A special Government employee is subject to the prohibitions in paragraphs (a) and (b) of this section only in relation to a particular matter involving a specific party or parties—

(i) In which the employee has at any time participated personally and substantially as a Government employee or as a special Government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise; or

(ii) That is pending in the Department.

(2) Paragraph (c)(1)(ii) of this section does not apply to a special Government employee who has served in the Department no more than 60 days during the immediately preceding period of 365 consecutive days.

(Authority: 18 U.S.C. 203, 205)

(d) *Permissible activities.* Notwithstanding the prohibitions in paragraphs (a)-(c) of this section, an employee may—

(1) If not inconsistent with the faithful discharge of the employee's duties, act without compensation as agent or attorney for any person who is the subject of a disciplinary, loyalty, or other personnel administration proceeding—including an equal employment opportunity complaint—in connection with that proceeding;

(2) With the approval of the Government official responsible for the employee's appointment to his or her position, act, with or without compensation, as agent or attorney for the employee's parents, spouse, child, or any person for whom, or for any estate for which, the employee is serving as guardian, executor, administrator, trustee, or other personal fiduciary, except in those matters—

(i) In which the employee has participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise; or

(ii) That are the subject of the employee's official responsibility.

(3) Give testimony under oath or make statements required to be made under penalty for perjury or contempt; and

(4) In the case of a special Government employee, act as agent or attorney for another person in the performance of work under a grant by or a contract with, or for the benefit of, the Government, if the head of the agency concerned with the grant or contract certifies in the FEDERAL REGISTER that the national interest requires this.

(Authority: 18 U.S.C. 203, 205)

(e) *Disqualification of former employees.* (1)(i)(A) A former employee may not represent any other person before the Government with respect to a particular matter involving a specific party or parties in which the employee was personally and substantially involved in his or her Government service.

(B) The prohibition in paragraph (e)(1)(i)(A) of this section is a permanent bar for the former employee.

(ii)(A) A former employee may not represent any other person before the Government on a particular matter involving a specific party or parties that was actually pending under the employee's official area of responsibility during the last year of that responsibility.

(B) The prohibition in paragraph (e)(1)(ii)(A) of this section applies for two years after leaving the responsibility described therein.

(2) Subject to the exemptions in 18 U.S.C. 207, a former senior employee—for one year after leaving the senior employee position—may not appear before or communicate to the Department on behalf of anyone in an attempt to influence a particular matter pending before the Department or in which the Department has a direct and substantial interest.

(3)(i) A former senior employee may not assist by personal presence in representing any other person in connection with a particular matter—

(A) Involving a specific party or parties;

(B) In which the United States has a direct or substantial interest; and

(C) In which the senior employee participated personally and substantially.

(ii) The prohibition in paragraph (e)(3)(i) of this section applies for two years after leaving the senior employee position.

(4) These restrictions are further defined by regulation (5 CFR Part 737).

(Authority: 18 U.S.C. 207)

(f) *Acts affecting a personal financial interest.* (1) An employee may not participate personally and substantially in a particular matter in which—to the employee's knowledge—the employee, the employee's spouse, minor child, or partner, or a profit or nonprofit enterprise in which the employee is serving as an officer, director, trustee, partner, or employee—or any person or enterprise with which the employee is negotiating or has an arrangement concerning prospective employment—has a financial interest.

(2) If a financial interest arises from ownership by the employee—or other person or enterprise referred to in paragraph (f)(1) of this section—of stock in a widely diversified mutual fund or other regulated investment company that in turn owns stock in another enterprise, that financial interest is exempt from the prohibition in paragraph (f)(1) of this section.

(3) The Secretary may grant an exemption to the prohibition in paragraph (f)(1) of this section in other cases if the financial interest is not so substantial as to affect the integrity of the employee's services.

(Authority: 18 U.S.C. 208)

(g) *Supplementation of salary.* Except for payments made under the authority in 5 U.S.C. 4111, an employee other than a special Government employee may not receive any contribution to or supplementation of his or her salary for services rendered for the Government.

(Authority: 18 U.S.C. 209)

§ 73.31 Political activity.

(a) *General prohibitions.* (1) An employee may not use official authority or influence to interfere with or affect the result of an election.

(2)(i) A covered employee may not take an active part in partisan political management or in partisan political campaigns, except as provided in paragraph (d) of this section.

(ii) For purposes of this section, the term "covered employee" includes every employee—including competitive and excepted service and Schedule C employees—except an employee who—

(A) Is appointed by the President by and with the advice and consent of the Senate; and

(B) Determines policies to be pursued by the United States in the nationwide administration of Federal laws.

(iii) A special Government employee is subject to the restriction in paragraph (a)(2)(i) of this section only when the employee is in active duty status and for the entire 24 hours of any day when in that status.

(3) The penalties for violation of this section include suspension without pay for a minimum of 30 days and removal.

(b) *Prohibited activities.* Types of activities prohibited by paragraph (a)(2)(i) of this section include, but are not restricted to, the following:

(1)(i) Being a candidate or campaigning for or against a candidate in a partisan election.

(ii) As used in this section, "partisan election" means an election for public office in which any candidate is running as a representative of a political party whose candidate for President of the United States received electoral votes in the last Presidential election.

(2) Making a campaign speech or engaging in a campaign activity in a partisan election.

(3) Collecting contributions for a political party or candidate or selling tickets to political fund-raising functions.

(4) Holding office in political clubs.

(c) *Permissible activities.* Types of activities not prohibited by paragraph (a)(2)(i) of this section include, but are not restricted to, the following:

(1) Registering and voting—including voting in a party primary or caucus—and signing nominating petitions.

(2) Expressing opinions about candidates and issues.

(3) Attending political rallies and meetings or political fund-raising functions.

(4) Contributing money to political organizations.

(5) Participating in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization.

(6) Being a member of a political party or other political organization.

(7) Taking an active part as a candidate or in support of a candidate in a nonpartisan election.

(d) *Partial exemption in designated communities.* An employee living in a community designated by OPM may participate—as, or on behalf of, an independent candidate—in political management and political campaigns in a partisan election involving that community, so long as that participation does not result in neglect of or interference with the performance of the employee's duties or create a conflict, or apparent conflict, of interests.

(Authority: 5 U.S.C. Chapter 73; 5 CFR Part 733)

§ 73.32 Conduct related to drugs.

(a) An employee may not use an illegal drug or participate in illegal drug activities.

(b)(1) As used in this section, the term "illegal drug" means a controlled substance—

(i) Defined by 21 U.S.C. 802(6) and included in Schedule I or II of 21 U.S.C. Chapter 13, Subchapter I, Part B; and

(ii) The possession of which is unlawful under chapter 13 of title 21.

(2) The term does not include a controlled substance used—

(i) According to a valid prescription; or

(ii) For another purpose authorized by law.

(c) As used in this section, the term "illegal drug activity" includes, but is not limited to, possession, distribution, or sale of an illegal drug.

(Authority: E.O. 12564)

§ 73.33 Use of Government property.

(a)(1) An employee may not directly or indirectly use, or allow the use of, Government property of any kind—including property leased to the Government—for other than an officially approved activity.

(2) The employee shall follow departmental directives prohibiting the unauthorized use of Government property for personal purposes.

(b) The employee shall protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to the employee.

(c) As used in this section, property includes, but is not restricted to, telephones, office supplies, copying machines and other office equipment, official identification and credit cards, official stationery and envelopes, secretarial support, and vehicles.

(Authority: 5 CFR 735.205)

§ 73.34 Gambling, betting, and lotteries.

(a) While on Government-owned or Government-leased property or while on duty for the Government, an employee may not participate in any gambling activity.

(b) As used in paragraph (a) of this section, gambling activity includes, but is not restricted to, operating a gambling device, conducting a lottery or pool, participating in a game for money or property, and selling or purchasing a numbers slip or ticket.

(Authority: 5 CFR 735.208)

§ 73.35 Misuse of information.

(a) For the purpose of furthering a private interest, an employee may not use or allow the use of official information that the employee has obtained through or in connection with his or her Government employment, unless the Government has made the information available to the general public or will make it available on request.

(b) Subject to 5 CFR 1250.3 (protecting particular "whistleblowing" activities) and 5 U.S.C. 7211, the employee shall comply with the Department's established procedures governing the release of official information to the press, the Congress, or the public, including referral of requests for documents or other materials to the Department's Freedom of Information Act Officer under 34 CFR Part 5.

(Authority: 5 CFR 735.206)

§ 73.36 Indebtedness.

(a)(1) An employee's indebtedness is primarily a matter of the employee's own concern.

(2) The Secretary does not determine the validity or amount of an employee's contested debts or act as a collection agent for those debts.

(b) In the absence of good reason, an employee is responsible, in a proper and timely manner, for—

(1) Honoring debts acknowledged by him or her to be valid or reduced to judgment by a court; and

(2) Making and adhering to satisfactory arrangements for the settlement of those debts.

(c) An employee shall meet his or her responsibilities for paying Federal, State, and local taxes and debts.

(Authority: 5 CFR 735.207)

§ 73.37 Miscellaneous statutory prohibitions.

An employee shall comply with each statute that relates to conduct as an employee, including prohibitions against the following activities: (a) Bribery, graft, and conflict of interest (18 U.S.C. chapter 11).

(b) Lobbying with appropriated funds (18 U.S.C. 1913).

(c) Disloyalty and striking (5 U.S.C. 7311 and 18 U.S.C. 1918).

(d) The disclosure of—

(1) Classified information (18 U.S.C. 798 and 50 U.S.C. 783); and

(2) Confidential information (18 U.S.C. 1905).

(e) The habitual use of intoxicating beverages to excess (5 U.S.C. 7352).

(f) The misuse of a Government vehicle (31 U.S.C. 1349).

(g) The misuse of penalty mail or the franking privilege (18 U.S.C. 1719).

(h) The use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(i) Fraud or false statements in a Government matter (18 U.S.C. 1001-1030).

(j) Mutilating or destroying a public record (18 U.S.C. 2071).

(k) Counterfeiting or forging transportation requests (18 U.S.C. 508).

(l)(1) Embezzlement of Government money or property (18 U.S.C. 641);

(2) Failing to account for public money (18 U.S.C. 643); and

(3) Embezzlement of another person's money or property in the possession of an employee by reason of his or her employment (18 U.S.C. 654).

(m) Unauthorized use of documents relating to claims by or against the Government (18 U.S.C. 285).

(n) Proscribed political activities (Subchapter III of Chapter 73, 5 U.S.C. and 18 U.S.C. 602, 603, and 607).

(o) Acting as the agent of a foreign principal under the Foreign Agents Registration Act (18 U.S.C. 219).

(p) Engaging in riots and civil disorders (5 U.S.C. 7313).

(q) Arbitrarily or capriciously withholding information requested under the Freedom of Information Act (5 U.S.C. 552(a)(4)(F)).

(r) Willfully violating the Privacy Act of 1974 (5 U.S.C. 552a(i)).

(s) Discrimination on the basis of race, color, national origin, sex, religion, age, or handicapping condition (42 U.S.C. 2000d-2000d-4; 42 U.S.C. 6101; 20 U.S.C. 1681; 29 U.S.C. 791, 793, 794; 42 U.S.C. 2000e).

(Authority: 5 CFR 735.104, 735.306)

Subpart E—Confidential Reporting Requirements—Employment and Financial Interests

§ 73.40 Confidential reporting of employment and financial interests—regular Government employees.

(a)(1) Except as provided in paragraphs (e), (h), and (k) of this section, not later than 30 days after entering duty in a position described in paragraph (a)(2) of this section, an employee shall submit in a sealed envelope to the appropriate principal officer a report—

(i) On a form made available by the Department; and

(ii) Containing the information specified in this section.

(2) As determined by the principal officer of the principal operating component in which the position is located, positions that are subject to reporting under this section include a position classified as GS-13 or above—or at a comparable pay level under other authority—

(i) That requires the incumbent to exercise judgment in making a Government decision or in taking Government action with regard to—

(A) Procurement activities;

(B) Administering or monitoring grants or subsidies;

(C) Regulating or auditing private or other non-Federal enterprise; or

(D) Other activities if the decision or action has an economic impact on the interest of any person outside the Government; or

(ii) That presents possible conflict-of-interest problems.

(b) The report shall include—

(1) A list of the names of all corporations, companies, firms, or other business enterprises, partnerships, nonprofit organizations, and educational or other institutions with or in which the employee, spouse, minor child, or other member of the employee's immediate household has—

(i) Any connection as an employee, officer, owner, director, member, trustee, partner, adviser, or consultant;

(ii) Any continuing financial interest, through a pension or retirement plan, shared income, or other arrangement as a result of any current or prior employment or business or professional association; or

(iii) (A) Any financial interest—except for those financial interests exempted elsewhere in this part—through the ownership of stock, stock options, bonds, securities, or other arrangements including trusts.

(B) The employee need not report shares in savings and loan associations that are in the nature of savings deposits;

(2) A list of the names of the creditors of the employee, spouse, minor child, or other member of the employee's immediate household, other than those creditors to whom they may be indebted by reason of a mortgage on property which they occupy as a personal residence or to whom they may be indebted for current and ordinary household and living expenses such as those incurred for household furnishings, an automobile, education, or vacations; and

(3) A list of the employee's interests and those of the employee's spouse, minor child, or other member of the employee's immediate household in real property or rights in lands, other than property that he or she occupies as a personal residence.

(c) By such date as the Secretary prescribes, the employee shall annually file a new report meeting the requirements of paragraph (b) of this section with information current through June 30 of that year.

(d) If the employee does not know, but another person does know, any information required to be included on a statement of employment and financial interests or supplementary statement, including holdings placed in trust, the employee shall request the other person to submit the information on the employee's behalf.

(e)(1) Paragraph (a) of this section does not require an employee to submit any information relating to a connection with, or interest in, a professional society or a charitable, religious social, fraternal, recreational, public service, civic, or political organization or a similar organization not conducted as a business enterprise.

(2) For the purpose of this section, the term "business enterprise" includes an educational or other institution doing research and development or related work involving a grant of money from or contract with the Government.

(f) The principal officer of the principal operating component in which the employee works—

(1)(i) Maintains each statement of employment and financial interests in confidence according to the filing, recording, notification, and other requirements of the Privacy Act of 1974 (Pub. L. 93-579);

(ii) Reviews each report and coordinates resolution of any conflict of interest or appearance of conflict of interest; and

(iii) May seek the advice and guidance of the DAEO.

(2) The principal officer and the DAEO do not disclose information from a statement except as the Office of Government Ethics or the DAEO may determine for good cause shown.

(g) The employee's submission of a statement of employment and financial interests and supplementary statements is—

(1) In addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, order, or regulation; and

(2) Does not permit anyone to participate in a matter if participation is prohibited by law, order, or regulation.

(h) This section does not apply to special Government employees, who are subject to the provisions of § 73.41.

(i) The Counselor may exclude from the reporting requirement an employee in a position that meets the criteria in paragraph (a) of this section if—

(1) The employee submits a written request for exclusion to the Counselor through the principal officer; and

(2) The Counselor determines that—

(i) The duties of the position make it unlikely that the employee would be involved in a conflict-of-interest situation; or

(ii) A statement of employment and financial interests is unnecessary because of—

(A) The degree of supervision and review over the incumbent; or

(B) The inconsequential effect of any potential conflict-of-interest on the integrity of the Government, given the employee's level of responsibility.

(j) If an employee believes that his or her position has been improperly included under paragraph (a) of this section, the employee may file a grievance under the Department's grievance procedure.

(k) An employee who is required to file a Public Financial Disclosure Report under Title II of the Ethics in Government Act is not required to file a report under this section.

(Authority: 5 U.S.C. App. 4, E.O. 12565)

§ 73.41 Confidential reporting of employment and financial interests—special Government employees.

(a) At the time of entering Government employment, a special Government employee shall submit in a sealed envelope to the appropriate principal officer on a form supplied by the Department a statement of employment and financial interests that discloses—

(1) All current Government employment;

(2) The names of all corporations, companies, firms, or other business enterprises, research organizations, and educational or other institutions in or for which he or she is an employee, officer, member, owner, trustee, director, adviser, or consultant, with or without compensation;

(3) The names of all corporations in which he or she holds stocks or bonds; and

(4) The names of all partnerships in which he or she is engaged.

(b) By such date as the Secretary prescribes, the special Government employee shall annually file a new report meeting the requirements of paragraph (a) of this section with information current through June 30 of that year.

(Authority: 5 U.S.C. App. 4, E.O. 12565)

§ 73.42 Reviewing statements of financial interests.

(a) The principal officer reviews the statements of employees in his or her principal operating component required by §§ 73.40 and 73.41 to determine whether there is a conflict, or appearance of conflict, between the interests of each employee and the performance of the employee's service for the Government.

(b) If the possibility of a conflict or appearance of conflict exists, the principal officer provides the employee with an opportunity to explain the conflict or appearance of conflict.

(c) If remedial action is indicated, the principal officer consults with the Counselor and an appropriate management official of the Department.

(d) The principal officer directs whatever appropriate remedial action he or she deems necessary (see § 73.5) after—

(1) The review referred to in paragraph (a) of this section;

(2) Consideration of the employee's explanation; and

(3) Any investigation the principal officer considers appropriate.

(Authority: 5 U.S.C. App. 4, E.O. 12565)

Subpart F—Post-Employment Conflicts of Interest

§ 73.50 Disciplinary proceedings for post-employment conflicts of interest.

(a) *Transmittal of allegations.* (1) An employee who initiates or receives an allegation that a former employee has violated 18 U.S.C. 207 (a), (b), or (c) or any regulations of the Office of Government Ethics or the Department implementing these statutory provisions shall submit the allegation and any supporting evidence to the Counselor.

(2) If the former employee was a member of the Counselor's office, the Secretary designates another employee, not connected with the Counselor's office, to perform the functions of the Counselor under this subpart.

(b) *Privacy.* Until the Counselor determines there is sufficient cause to initiate an administrative disciplinary proceeding, the Counselor safeguards the allegation and evidence in order to protect the privacy of the former employee.

(c) *Involvement of Department of Justice and Office of Government Ethics.* (1) If the information concerning a possible violation does not appear to be frivolous, the Counselor expeditiously provides all relevant evidence, any appropriate comments, and copies of applicable agency regulations to the Director, Office of Government Ethics, and to the Criminal Division, Department of Justice.

(2) Unless the Department of Justice informs the Counselor that it does not intend to initiate criminal prosecution, the Counselor coordinates any investigation or administrative action with the Department of Justice in order to avoid prejudicing criminal proceedings.

(d) *Initiation of disciplinary proceedings.* If the Counselor determines after appropriate review that there is reasonable cause to believe that the former employee has committed a violation, the Counselor may—

(1) Initiate an administrative disciplinary proceeding; and

(2) Designate an individual to represent the Department in the proceeding.

(e) *Notice.* (1) The Counselor or an individual designated under paragraph (d)(2) of this section provides the former employee with written notice of the Department's intention to institute a proceeding and of the former employee's opportunity for a hearing.

(2) The notice includes the following:

(i) A statement of allegations, and the basis for the allegations, in sufficient detail to enable the former employee to prepare an adequate defense.

(ii) Notification of the former employee's right to a hearing and to submit an answer within 30 days of receipt of the notice.

(iii) An explanation of the method by which a hearing may be requested.

(iv) A notification that if the former employee fails to submit an answer within 30 days of receipt of the notice, the presiding official may render a decision by default against the former employee.

(f) *Hearing.* The former employee may obtain a hearing by submitting a written request to the Counselor within 30 days of receipt of the notice.

(g) *Examiner.* The Secretary designates as the presiding official at the proceedings a hearing examiner who—

(1) Is impartial;

(2) Did not participate in the decision to initiate the proceedings; and

(3) Is authorized by the Secretary to make an initial decision.

(h) *Time, Date, and Place.* (1) The hearing examiner conducts the hearing at a reasonable time, date, and place.

(2) In setting the date, the hearing examiner considers the former employee's need for—

(i) Adequate time to properly prepare a defense; and

(ii) An expeditious resolution of allegations that may be damaging to the former employee's reputation.

(i) *Hearing rights.* The hearing includes, as a minimum, the right of each party to—

(1) Represent himself or herself or be represented by counsel;

(2) Introduce and examine witnesses and submit physical evidence;

(3) Confront and cross-examine adverse witnesses;

(4) Present oral argument; and

(5) On request, have a transcript or recording of the proceedings.

(j) *Burden of Proof.* The Department has the burden of proof and must establish substantial evidence of a violation.

(k) *Decision.* The hearing examiner—

(1) Makes a decision based exclusively on the record of the proceedings; and

(2) Discloses all findings of fact and conclusions of law relevant to the decision.

(l) *Appeal within the Department.* (1) Within 30 days of the date of the hearing examiner's decision, either party may appeal the decision to the Secretary.

(2) The Secretary makes a decision on the appeal based solely on the record of the proceedings or on those portions of the record agreed to by the parties to limit the issues.

(3) If the Secretary modifies or reverses the hearing examiner's decision, the Secretary specifies the findings of fact and conclusions of law that are different from those of the hearing examiner.

(m) *Administrative Sanctions.* (1) The Secretary may take administrative sanctions if—

(i) The former employee fails to answer or request a hearing after receipt of adequate notice; or

(ii) The hearing examiner or the Secretary has made a final administrative determination that the former employee had violated 18 U.S.C. 207 (a), (b), or (c) or regulations of the Office of Government Ethics or the Department under these statutory provisions.

(2) If the former employee does not file an answer within 30 days of receipt of the notice, the Counselor may render a decision by default against the former employee.

(3) The Secretary may—

(i) Prohibit the former Government employee from appearing before or communicating with the Department on behalf of any other person for a period that does not exceed five years; or

(ii) Take other appropriate disciplinary action.

(n) *Judicial Review.* If the Department's administrative decision finds that the former employee participated in a violation of 18 U.S.C. 207 (a), (b), or (c) or regulations of the Office of Government Ethics or the Department issued under these statutory provisions, the former employee may seek judicial review of the administrative decision.

(Authority: 18 U.S.C. 207)

[54 FR 5026, Jan. 31, 1989; 54 FR 6364, Feb. 9, 1989]

APPENDIX TO PART 73—CODE OF ETHICS FOR GOVERNMENT SERVICE

Any person in Government service should:

Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.

Uphold the Constitution, laws, and regulations of the United States and all governments therein and never be a party to their evasion.

Give a full day's labor for a full day's pay; giving to the performance of his duties his earnest effort and best thought.

Seek to find and employ more efficient and economical ways of getting tasks accomplished.

Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or his family, favors or benefits under circumstances that might be construed by reasonable persons as influencing the performance of his governmental duties.

Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.

Engage in no business with the Government, either directly or indirectly, that is inconsistent with the conscientious performance of his governmental duties.

Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.

Expose corruption wherever discovered.

Uphold these principles, ever conscious that public office is a public trust.

(This Code of Ethics was agreed to by the House of Representatives and the Senate as House Concurrent Resolution 175 in the Second Session of the 85th Congress. The Code applies to all Government employees.)

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APPENDIX A—C [RESERVED]

APPENDIX D—PART I—PRINCIPLES FOR DETERMINING COSTS APPLICABLE TO RESEARCH AND DEVELOPMENT UNDER GRANTS AND CONTRACTS WITH EDUCATIONAL INSTITUTIONS

APPENDIX D—PART II—PRINCIPLES FOR DETERMINING COSTS APPLICABLE TO TRAINING AND OTHER EDUCATIONAL SERVICES UNDER GRANTS AND CONTRACTS WITH EDUCATIONAL INSTITUTIONS

APPENDIX E—PRINCIPLES FOR DETERMINING COSTS APPLICABLE TO RESEARCH AND DEVELOPMENT UNDER GRANTS AND CONTRACTS WITH HOSPITALS

AUTHORITY: 20 U.S.C. 3474; OMB Circular A-110, unless otherwise noted.

SOURCE: 53 FR 8106, Mar. 11, 1988, unless otherwise noted.

Subpart A—General

§ 74.1 Purpose and scope of this part.

(a) This part establishes uniform requirements for the administration of ED grants and principles for determining costs applicable to activities assisted by ED grants for all grantees other than State and local governments and Indian tribal organizations.

(b) Uniform requirements for State and local governments and Indian tribal organizations are in 34 CFR Part 80—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

(c) Recipients subject to this part are also subject to 34 CFR Parts 75, 76, 77, 78, and 79, to the extent applicable.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.2 Scope of subpart.

This subpart contains general rules pertaining to this Part 74 (definitions, purpose and scope, applicability, and appeals) and procedures for control of deviations from the part.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.3 Definitions.

As used in this part:

Awarding party means (1) with respect to a grant, ED, and (2) with respect to a subgrant, the grantee. (See § 74.4(b))

Contract means (except as used in the definitions for "grant" in this section and except where qualified by "Federal") a procurement contract under a grant and "subcontract" means a procurement subcontract under such a contract.

Cost-type contract means a contract or subcontract in which the contractor or subcontractor is paid on the basis of the costs it incurs, but the term does not include such subcontracts under a non-cost-type contract or subcontract.

ED means the U.S. Department of Education.

Expenditure report means:

(1) For nonconstruction grants, the "Financial Status Report" (or other equivalent report);

(2) For construction grants, the "Outlay Report and Request for Reimbursement for Construction Programs" (or other equivalent report). (See Subpart I of this part.)

Grant means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government to an eligible recipient. The term does not include any Federal procurements subject to the procurement regulations in 48 CFR, nor does it include technical assistance, which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the recipient is not required to account for on an actual cost basis.

Grantee means the nonprofit corporation or other legal entity to which a grant is awarded and which is accountable to the Federal Government for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the award document. For example, a grant award document may name as the grantee one school or campus of a university. In this case, the granting agency usually intends, or actually requires, that the named component assume primary or sole responsibility for administering the grant-assisted project or program. Nevertheless, the naming of a component of a legal entity as the grantee in a grant award document shall not be construed as relieving the whole legal entity from accountability to the Federal Government for the use of the funds provided. (This definition is not intended to affect the eligibility provision of grant programs in which eligibility is limited to organizations, such as State educational agencies, which may be only components of a legal entity.) The term "grantee" does not include any secondary recipients such as subgrantees, contractors, etc., who may receive funds from a grantee pursuant to a grant.

OMB means the Office of Management and Budget within the Executive Office of the President.

Recipient means grantee or subgrantee.

Terms of a grant or subgrant means all requirements of the grant or subgrant, whether in statute, regulations, the award document or elsewhere.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.4 Applicability of this part.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (3) of this section or where inconsistent with Federal statutes, regulations, or other terms of a grant, this part applies to all ED grants.

(2) With the exception of 34 CFR 74.62, which applies to Chapter 1, this part does not apply to the programs authorized under Chapter 1 and Subchapters A through C of Chapter 2 of the Education Consolidation and Improvement Act of 1981.

(3) Unless expressly made applicable by ED, this part does not apply when the grantee is a Federal agency, foreign government or organization, international organization such as the United Nations, for profit organization, or individual.

(b) *Public institutions of higher education and hospitals.* Grants and subgrants to institutions of higher education and hospitals operated by a government shall be subject to provisions of this subpart.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.6 Deviations.

(a) Except as provided in § 74.7, a deviation is any exception to this part not required by Federal statute without allowance of agency discretion. A deviation may be either:

(1) Use of any policy, procedure, form, standard, or grant term which is inconsistent with an applicable provision of this part, or

(2) Failure to use any applicable policy, procedure, form, standard, or grant term which is required by this part.

(b) In order to maintain uniformity to the greatest extent feasible, deviations shall be kept to a minimum. A deviation, whether proposed by an applicant, a recipient, or an official of ED may be authorized only when it is necessary to meet programmatic objectives, or to conserve grant funds, or when it is otherwise essential in the public interest.

(c) A deviation from this part may be made only when authorized by the Secretary.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.7 Special grant conditions.

(a) Without regard to the deviation control procedures of § 74.6, special grant conditions more restrictive than those prescribed in this Part 74 may be imposed as needed when ED has determined that the grantee:

(1) Is financially unstable.

(2) Has a history of poor performance, or

(3) Has a management system which does not meet the standards of this part.

(b) When special conditions are imposed under paragraph (a) of this section, the grantee will be notified in writing:

(1) Why the special conditions were imposed and

(2) What corrective action is needed.

Furthermore, in accordance with OMB Circular A-110, OMB and other Federal agencies in a granting relationship with the grantee will be provided copies of the notice to the grantee.

Subpart B—Cash Depositories

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.10 Physical segregation and eligibility.

Except as provided in § 74.11, awarding parties shall not impose grant terms which:

(a) Require the recipient to use a separate bank account for the deposit of grant funds, or

(b) Establish any eligibility requirements for banks or other financial institutions in which recipients deposit grant funds.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.11 Checks-paid basis letter of credit.

A separate bank account shall be used when payments under letter of credit are made on a "checks-paid" basis. A checks-paid basis letter of credit is one under which funds are not drawn until the recipient's checks have been presented to its bank for payment. (See Subpart K for definition of "letter of credit.")

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.12 Minority-owned banks.

Consistent with the national goal of expanding opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority-owned banks. Upon request, ED will furnish a list of minority-owned banks.

Subpart C—Bonding and Insurance

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.15 General.

In administering grants and subgrants, recipients shall observe their regular requirements and practices with respect to bonding and insurance. No additional bonding and insurance requirements, including fidelity bonds, shall be imposed by the terms of the grant or subgrant except as provided in §§ 74.16 through 74.18.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.16 Construction and facility improvements.

(a) *Scope of this section.* This section covers requirements for bid guarantees, performance bonds, and payment bonds when the recipient will contract for construction or facility improvement (including alterations and renovations of real property) under a grant or subgrant.

(b) *Definitions.* (1) "Bid guarantee" means a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, if its bid is accepted, execute the required contractual documents within the time specified.

(2) "Performance bond" means a bond executed in connection with a contract to secure fulfillment of all the contractor's obligations under the contract.

(3) "Payment bond" means a bond executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(c) *Bids and contracts of $100,000 or less.* The recipient shall follow its own requirements and practices relating to bid guarantees, performance bonds, and payment bonds.

(d) *Bids and contracts exceeding $100,000.* The recipient may follow its own regular policy and requirements if the Secretary has determined that the Federal Government's interest will be adequately protected. If this determination has not been made, the minimum requirements shall be as follows:

(1) A bid guarantee from each bidder equivalent to 5 percent of the bid price;

(2) A performance bond on the part of the contractor for 100 percent of the contract price; and

(3) A payment bond on the part of the contractor for 100 percent of the contract price.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.17 Fidelity bonds.

(a) ED may require a grantee to carry adequate fidelity bond coverage where the absence of coverage for the grant-supported activity is considered as creating an unacceptable risk.

(b) A fidelity bond is a bond indemnifying the recipient against losses resulting from the fraud or lack of integrity, honesty or fidelity of one or more employees, officers or other persons holding a position of trust.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.18 Source of bonds.

Any bonds required under § 74.16(d)(1) through (3) or § 74.17 shall be obtained from companies holding certificates of authority as acceptable sureties (31 CFR Part 223). A list of these companies is published annually by the Department of the Treasury in its Circular 570.

Subpart D—Retention and Access Requirements for Records

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.20 Applicability.

(a) Except as provided in paragraph (b) of this section, this subpart applies to all financial and programmatic records, supporting documents, statistical records and other records of recipients and of contractors and subcontractors under grants and subgrants, which are:

(1) Required to be maintained by the terms of an ED grant, or

(2) Otherwise reasonably considered as pertinent to an ED grant.

(b) This subpart does not apply to records maintained by the contractor or subcontractor for any of the following types of awards it has received under a grant or subgrant:

(1) Any contract or subcontract of $10,000 or less, or

(2) Any contract or subcontract awarded using the formal advertising method of procurement, whether or not required to be so awarded, or

(3) Any subcontract awarded under a contract or subcontract described in paragraph (b)(2) of this section.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.21 Length of retention period.

(a) Except as provided in paragraphs (b) and (c) of this section, records shall be retained for 3-years from the starting date specified in § 74.22.

(b) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3 year period, the records shall be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(c) In order to avoid duplicate recordkeeping, awarding parties may make special arrangements with recipients to retain any records which are continuously needed for joint use. The awarding party will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the awarding party the 3-year retention requirement is not applicable to the recipient.

CROSS-REFERENCE: See 34 CFR 75.734—Record retention period. Section 75.734 contains record retention requirements imposed by the General Education Provisions Act.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.22 Starting date of retention period.

(a) *General.* (1) Where ED grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee submits to ED its single or last expenditure report for that period. However, if ED grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits to ED its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report to ED. If an expenditure report has been waived, the retention period starts on the day the report would have been due. "Expenditure report" is defined in § 74.3.

(2) Exceptions to this paragraph are contained in paragraphs (b) through (d) of this section.

(b) *Equipment records.* The retention period for the equipment records required by § 74.140(a) starts from the date of the equipment's disposition (§ 74.139) or replacement (§ 74.138) or transfer at the direction of the awarding party (§ 74.136).

(c) *Records for income transactions after grant or subgrant support.* (1) In some cases an ED requirement concerning the disposition of program income, as defined in Subpart F of this part, will be satisfied by applying the income to costs incurred after expiration or termination of grant or subgrant support for the activity giving rise to the income. In such a case, the retention period for the records pertaining to the costs starts from the end of the recipient's fiscal year in which the costs are incurred.

(2) In some cases, there may be an ED requirement concerning the disposition of copyright royalties or other program income which is earned after expiration or termination of grant or subgrant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the recipient's fiscal year in which the income is earned. (See Subpart F of this part.)

(d) *Indirect cost rate proposals, cost allocation plant, etc.*—(1) *Applicability.* This paragraph applies to the following types of documents, and their supporting records:

(i) Indirect cost rate computations or proposals;

(ii) Any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(2) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(3) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government for negotiation purposes, then the 3-year retention period for the proposal, plan, or computation and its supporting records starts from the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

CROSS-REFERENCE: See 34 CFR 75.734—Record retention period. Section 75.734 contains record retention requirements imposed by the General Education Provisions Act.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.23 Substitution of microfilm.

Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.24 Access to records.

(a) *Records of grantees.* The Secretary and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any books, documents, papers, or other records of the grantee which are pertinent to the ED grant, in order to make audit, examination, excerpts, and transcripts.

(b) *Records of subgrantees.* The Secretary, the Comptroller General of the United States, and the grantee, or any of their authorized representatives, shall have the right of access to any books, documents, papers, or other records of the subgrantee which are pertinent to the ED grant, in order to make audit, examination, excerpts, and transcripts.

(c) *Records of contractors and subcontractors.* Except as provided in § 74.20(b), the Secretary, the Comptroller General of the United States, the grantee, and (if the contract was awarded under a subgrant) the subgrantee, or any of their authorized representatives, shall have the right of access to any books, documents, papers, or other records of the contractor or subcontractor which are pertinent to the ED grant, in order to make audit, examination, excerpts, and transcripts.

(d) *Expiration of right of access.* The rights of access in this section shall not be limited to the required retention period but shall last as long as the records are retained.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.25 Restrictions on public access.

Unless required by Federal statutes, awarding parties may not impose grant terms which limit public access to records covered by this subpart except after a determination by ED that the records must be kept confidential and would have been excepted from disclosure under ED's "Freedom of Information" regulation (Part 5 of this title) if the records had belonged to ED. This section does not require recipients or their contractors and subcontractors to permit public access to their records.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

Subpart E [Reserved]

Subpart F—Grant-Related Income

§ 74.40 Scope of subpart.

This subpart contains policies and requirements relating to (a) program income and (b) interest and other investment income earned on advances of grant funds.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.41 Meaning of program income.

(a) Except as explained in paragraphs (b) and (c) of this section, program income means gross income earned by a recipient from activities part or all of the cost of which is either borne as a direct cost by a grant or counted as a direct cost towards meeting a cost sharing or matching requirement of a grant. It includes but is not limited to such income in the form of fees for services performed during the grant or subgrant period, proceeds from sale of tangible personal or real property, usage or rental fees, and patent or copyright royalties. If income meets this definition, it shall be considered program income regardless of the method used to calculate the amount paid to the recipient—whether, for example, by a cost-reimbursement method or fixed price arrangement. Nor will the fact that the income is earned by the recipient from a Federal procurement contract or from a procurement contract under a Federal grant awarded to another party affect the income's classification as program income.

(b) For research grants that are subject to an institutional cost-sharing agreement, income shall be considered program income only if it is earned from an activity part of all or the cost of which is borne as a direct cost by the Federal grant funds. An institutional cost-sharing agreement is one entered into between ED and a grantee covering all of ED's research project grants to the grantee in the aggregate.

(c) The following shall not be considered program income:

(1) [Reserved]

(2) Tuition and related fees received by an institution of higher education for a regularly offered course taught by an employee performing under a grant or subgrant.

(d) For the purposes of this subpart, program income is divided into several categories. Each category is treated in a separate section of this subpart.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.42 General program income.

(a) *Definition.* General program income means all program income accruing to a grantee during the period of grant support or to a subgrantee during the period of subgrant support, other than the special categories of such income treated in §§ 74.43 through 74.45.

(b) *Use.* General program income shall be retained by the recipient and used in accordance with one or a combination of the alternatives in paragraphs (c), (d), and (e) of this section, as follows: The alternative in paragraph (c) of this section may always be used by recipients and must be used if neither of the other two alternatives is permitted by the terms of the grant. The alternatives in paragraph (d) or (e) of this section may be used only if expressly permitted by the terms of the grant. In specifying alternatives that may be used, the terms of the grant may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income.

(c) *Deduction alternative.* (1) Under this alternative, the income is used for allowable costs of the project or program. If there is a cost-sharing or matching requirement, costs borne by the income may not count toward satisfying that requirement. Therefore, the maximum percentage of Federal participation is applied to the net amount determined by deducting the income from total allowable costs and third-party in-kind contributions. The income shall be used for current costs unless ED authorizes deferral to a later period.

(2) To illustrate this alternative, assume a project in which the grantee incurs $100,000 of allowable costs and receives no third-party in-kind contributions. If the grantee earns $10,000 in general program income and this alternative applies, that $10,000 must be deducted from the $100,000 before applying the maximum percentage of Federal participation. If that percentage is 90 percent, the most that could be paid to the grantee would therefore be $81,000 (90 percent times $90,000).

(d) *Cost-sharing or matching alternative.* (1) Under this alternative, the income is used for allowable costs of the project or program but, in this case the costs borne by the income may count toward satisfying a cost-sharing or matching requirement. Therefore, the maximum percentage of Federal participation is applied to total allowable costs and third-party in-kind contributions. The income shall be used for current costs unless ED authorizes deferral to a later period.

(2) To illustrate this alternative, assume the same situation as in paragraph (c)(2) of this section. Under this alternative, the 90 percent maximum percentage of participation would be applied to the full $100,000, and $90,000 could therefore be paid to the grantee. (It should be noted that if $20,000 of general program income is earned, only $80,000 could be paid, since a grant cannot pay for costs which have been borne by general program income.)

(e) *Additional cost alternative.* Under this alternative, the income is used for costs which are in addition to the allowable costs of the project or program but which nevertheless further the objectives of the Federal statute under which the grant was made, Provided that the costs borne by the income further the broad objectives of that statute, they need not be of a kind that would be permissible as charges to Federal funds. Examples of purposes for which the income may be used are:

(1) Expanding the project or program.

(2) Continuing the project or program after grant or subgrant support ends.

(3) Suporting other projects or programs that further the broad objectives of the statute.

(4) Obtaining equipment or other assets needed for the project or program or for other activities that further the statute's objectives.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.43 Program income—proceeds from sale of real property and from sale of equipment and supplies acquired for use.

The following kinds of program income shall be governed by Subpart O of this part:

(a) Proceeds from the sale of real property purchased or constructed under a grant or subgrant.

(b) Proceeds from the sale of equipment and supplies fabricated or purchased under a grant or subgrant and intended primarily for use in the grant- or subgrant-supported project or program rather than for sale or rental.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.44 Program income—royalties and other income earned from a copyrighted work.

(a) This section applies to royalties, license fees, and other income earned by a recipient from a copyrighted work developed under the grant or subgrant. Income of that kind is covered by this section whether a third party or the recipient itself acts as the publisher, seller, exhibitor, or performer of the copyrighted work. In some cases the recipient incurs costs to earn the income but does not charge these costs to ED grant funds, to required cost-sharing or matching funds, or to other program income. Costs of that kind may be deducted from the gross income in order to determine how much must be treated as program income.

(b) The terms of the grant govern the disposition of income subject to this section. If the terms do not treat this kind of income, there are no ED requirements governing the disposition.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.45 Program income—royalties or equivalent income earned from patents or from inventions.

Disposition of royalties or equivalent income earned on patents or inventions arising out of activities assisted by a grant or subgrant shall be governed by determinations made or agreements entered into under ED's patent regulations. (See Parts 6 and 8 of this title.) If the determination or agreement does not provide for the disposition of the royalties or equivalent income, the disposition shall be in accordance with the recipients' own policies.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.46 Program income—income after grant or subgrant support not otherwise treated.

(a) This section applies to program income not treated elsewhere in this part which arises from or is attributable to an activity while supported by a grant or subgrant but which does not accrue until after the period of grant or subgrant support. An example is proceeds from the sale or rental of a residual inventory or merchandise fabricated or purchased by a grant-supported workshop during the period of support.

(b) The terms of the grant govern the disposition of income subject to this section. If the terms do not treat this kind of income, there are no ED requirements governing the disposition.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.47 Interest earned on advances of grant funds.

(a) Except when exempted by Federal statute grantees shall remit to the Federal Government any interest or other investment income earned on advances of ED grant funds. This includes any interest or investment income earned by cost-type contractors on advances to them that are attributable to advances of ED grant funds to the grantee. Unless the grantee receives other instructions from the responsible ED official, the grantee shall remit the amount due by check or money order payable to the Department of Education.

(b) Recipients are cautioned that they are subject to the provisions in § 74.61(e) for minimizing the time between the transfer of advances and their disbursement. Those provisions apply even if there is no accountability to the Federal Government for interest or other investment income earned on the advances.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

Subpart G—Cost Sharing or Matching

§ 74.50 Scope of subpart.

(a) This subpart contains rules for satisfying Federal requirements for cost sharing or matching. These rules apply whether the cost sharing or matching is required by Federal statute or by other terms of the grant.

(b) ED and a grantee may enter into an institutional cost-sharing argeement covering all of ED's research project grants to that grantee in the aggregate. Except as provided by the institutional cost-sharing agreement, this subpart applies to the satisfaction of the grantee's obligation under the agreement, as well as to the satisfaction of cost-sharing or matching requirements that apply only to a single grant.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§ 74.51 Definitions.

For purposes of this subpart:

"Cost sharing or matching" means the value of third-party in-kind contributions and that portion of the costs of a grant-supported project or program not borne by the Federal Government.

"Equipment" has the same meaning given to that term in § 74.132, except that instead of "acquisition cost," the words "market value at the time of donation" shall be substituted.

"Supplies" means all tangible personal property other than "equipment" as defined in this section.

"Third-party in-kind contributions" means property or services which benefit a grant-supported project or program and which are contributed by non-Federal third parties without charge to the grantee, the subgrantee, or a cost-type contractor under the grant or subgrant.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§ 74.52 Basic rule: Costs and contributions acceptable.

With the qualifications and exceptions listed in § 74.53, a cost-sharing or matching requirement may be satisfied by either or both of the following:

(a) Allowable costs incurred by the grantee, the subgrantee, or a cost-type contractor under the grant or subgrant. This includes allowable costs borne by non-Federal grants or by other cash donations from non-Federal third parties.

(b) The value of third-party in-kind contributions applicable to the period to which the cost-sharing or matching requirement applies.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§ 74.53 Qualifications and exceptions.

(a) *Costs borne by other Federal grants.* Except as provided by Federal statute, a cost-sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to costs borne by general program income earned from a contract awarded under another Federal grant.

(b) *Costs or contributions counted towards other Federal cost-sharing requirements.* Neither costs nor the values of third-party in-kind contributions may count towards satisfying a cost-sharing or matching requirement of an ED grant if they have been or will be counted towards satisfying a cost-sharing or matching requirement of another Federal grant, a Federal procurement contract, or any other award of Federal funds.

(c) *Costs financed by general program income.* Costs financed by general program income, as defined in § 74.42, shall not count towards satisfying a cost-sharing or matching requirement of the ED grant supporting the activity giving rise to the income unless the terms of the grant expressly permit the income to be used for cost sharing or matching. (This is the alternative for use of general program income described in § 74.42(d).)

(d) *Records.* Costs and third-party in-kind contributions counting towards satisfying a cost-sharing or matching requirement must be verifiable from the records of recipients or cost-type contractors. These records must show how the value placed on third-party in-kind contributions was arrived at. To the extent feasible, volunteer services shall be supported by the same methods that the organization uses to support the allocability of its regular personnel costs.

(e) *Special standards for third-party in-kind contributions.* (1) Third-party in-kind contributions shall count towards satisfying a cost-sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(2) A third-party in-kind contribution shall not count as direct cost sharing or matching where, if the party receiving the contribution were to pay for it, the payment would be an indirect cost. Cost-sharing or matching credit for such contributions shall be given only if the recipient or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(3) The values placed on third-party in-kind contributions for cost-sharing or matching purposes shall conform to the rules in the succeeding sections of this subpart. If a third party in-kind contribution is of a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.54 Valuation of donated services.

(a) *Volunteer services.* Unpaid services provided to a recipient by individuals shall be valued at rates consistent with those ordinarily paid for similar work in the recipient's organization. If the recipient does not have employees performing similar work, the rates shall be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(b) *Employees of other organizations.* When an employer other than a recipient or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services shall be valued at the employee's regular rate of pay exclusive of the employer's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (a) of this section shall apply.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.55 Valuation of donated supplies and loaned equipment or space.

(a) If a third party donates supplies, the contribution shall be valued at the market value of the supplies at the time of donation.

(b) If a third party donates the use of equipment or space in a building but retains title, the contribution shall be valued at the fair rental rate of the equipment or space.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.56 Valuation of donated equipment, buildings, and land.

If a third party donates equipment, buildings or land, and title passes to a recipient, the treatment of the donated property shall depend upon the purpose of the grant, as follows:

(a) *Awards for capital expenditures.* If the purpose of the grant is to assist the recipient in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(b) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant, the following rules apply:

(1) If approval is obtained from the awarding party, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In all cases, the approval may be given only if a purchase of the equipment or buildings or a purchase or rental of the land would be approved as an allowable direct cost.

(2) If approval is not obtained under paragraph (b)(1) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the recipi-

ent. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in Subpart Q of this part, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§ 74.57 Appraisal of real property.

In some cases under §§ 74.55 and 74.56, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, ED may require that the market value or fair rental rate be established by a certified real property appraiser (or by a representative of the U.S. General Services Administration, if available) and that the value or rate be certified by a responsible official of the party to which the property or its use is donated.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

Subpart H—Standards for Grantee and Subgrantee Financial Management Systems and Non-Federal Audits

§ 74.60 Scope of subpart.

(a) This subpart contains standards for financial management systems and non-Federal audits of recipients.

(b) Awarding parties may not impose on recipients additional financial management standards or requirements concerning non-Federal audits. The awarding parties may, however, provide recipients with suggestions and assistance on these subjects.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§ 74.61 Financial management standards.

Grantees and subgrantees shall meet the following standards for their grant and subgrant financial management systems.

(a) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of each project or program shall be made in accordance with the financial reporting requirements of the grant or subgrant. The terms of grants and subgrants shall not require financial reporting on the accrual basis if the recipient's accounting system is maintained on the cash basis. When accrual reporting is statutorily required, a recipient whose accounting system is not maintained on that basis shall not be required to convert it to the accrual basis; the recipient may develop the accrual information through an analysis of the documentation on hand.

(b) *Accounting records.* Records which identify adequately the source and application of funds for grant or subgrant-supported activities shall be maintained. These records shall contain information pertaining to grant or subgrant awards, authorizations, obligations, unobligated balances, assets, outlays, income, and, if the recipient is a government, liabilities.

(c) *Internal control.* Effective control and accountability shall be maintained for all grant or subgrant cash, real and personal property covered by Subpart O of this part, and other assets. Recipients shall adequately safeguard all such property and shall assure that it is used solely for authorized purposes.

(d) *Budgetary control.* The actual and budgeted amounts for each grant or subgrant shall be compared. If appropriate or specifically required, recipients shall relate financial information to performance or productivity data, including the production of unit cost information. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(e) *Advance payments.* Procedures shall be established to minimize the time elapsing between the advance of Federal grant or subgrant funds and their disbursement by the recipient. When advances are made by a letter-of-credit method, the recipient shall make drawdowns as close as possible to the time of making disbursements. Grantees advancing cash to subgrantees shall conform substantially to the same standards of timing and amount as apply to advances by Federal agencies to grantees, including requirements for timely reporting of cash disbursements and balances. (See Subpart K of this part.)

(f) *Allowable costs.* Procedures shall be established for determining the reasonableness, allowability, and allocability of costs in accordance with the applicable cost principles prescribed by Subpart Q of this part and the terms of the grant.

(g) *Source documentation.* Accounting records shall be supported by source documentation such as cancelled checks, paid bills, payrolls, contract and subgrant award documents, etc.

(h) *Audit*—(1) *General.* (i) This paragraph applies to each recipient that is not subject to the audit requirements in the appendix to 34 CFR Part 80.

(ii) Public hospitals and public colleges and universities are subject to this paragraph if excluded under paragraph 4 of the appendix to 34 CFR Part 80.

(iii) A financial and compliance audit shall be made in accordance with generally accepted auditing standards, including the standards of the U.S. General Accounting Office's publication "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions." [1] The auditors engaged by a recipient shall meet the criteria for qualifications and independence in that publication.

(2) *Purpose and scope.* The purpose of these audits shall be to determine the effectiveness of the financial management systems and internal procedures established by the recipient to meet the terms of its grants and subgrants. The recipient's auditors need not examine every grant or subgrant awarded to the recipient. Rather, audits generally should be made on an organization-wide basis to test the fiscal integrity of financial transactions and compliance with the terms of awards. These tests would include an appropriate sampling of Federal grants and subgrants.

(3) *Frequency.* These audits shall be conducted on a continuing basis or at scheduled intervals, usually once a year, but at least every two years. The frequency shall depend on the nature, size and complexity of the recipient's grant- or subgrant-supported activities.

(4) *Relation to Federal audit.* These audits may affect the frequency and scope of Federal audit. However, nothing in this section is intended to limit the right of the Federal Government to conduct an audit of a grant- or subgrant-supported activity.

(5) *Audit resolution.* The recipient shall follow a systematic method to assure timely and appropriate resolution of audit findings and recommendations.

(6) *Copies of audit reports.* A copy of each audit report, and a description of its resolution, shall be furnished to ED.

(Approved by the Office of Managemen and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 3474; OMB Circula A—110)

[53 FR 8106, Mar. 11, 1988, as amended a 53 FR 49143, Dec. 6, 1988]

Subpart I—Financial Reporting Requirements

§74.70 Scope and applicability of subpar

This subpart prescribes require ments and forms for grantees t report financial information to ED and to request grant payments when letter of credit is not used.

(Authority: 20 U.S.C. 3474; OMB Circul A—110)

§74.71 Definitions.

As used in this subpart or in th forms identified by this subpart:

Accrued expenditures are th charges by grantee during a give period requiring the provision of fun for: (a) Goods and other tangible pro erty received; (b) services performe by employees, contractors, and oth payees; and (c) amounts "becomi owed" for which no current services performance is required, such as ann ities, insurance claims, and other benefit payments.

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[1] Available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Accrued income is the sum of (a) earnings during a given period from services performed by the grantee and from goods and other tangible property delivered to purchasers, and (b) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Federal funds authorized means the total amount of Federal funds obligated by the Federal Government and authorized for use by the grantee.

In-kind contributions means *third party in-kind contributions* as defined in Subpart G of this part.

Obligations are the amounts of orders placed, contracts awarded, services received, and similar transactions during a given period, which will require payment during the same or a future period.

Outlays are charges made to the grant project or program. Outlays may be reported on a cash or accrual basis.

Program income has the same meaning it has in Subpart F of this part.

Unliquidated obligations, for reports prepared on a cash basis, are the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they are the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance is the portion of the Federal funds authorized which has not been obligated by the grantee and is determined by deducting the grantee's cumulative obligations from the cumulative Federal funds authorized.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.72 General.

(a) Except as provided in paragraphs (d) and (e) of this section, grantees shall use only the forms specified in §§ 74.73 through 74.76, and such supplementary or other forms as may from time to time be authorized by ED, for:

(1) Submitting grant financial reports to granting agencies, or

(2) Requesting advances or reimbursements when letters of credit are not used.

(b) Grantees shall follow all applicable standard instructions issued by OMB for use in connection with the forms specified in §§ 74.73 through 74.76. ED may issue substantive supplementary instructions. ED may shade out or instruct the grantee to disregard any line item that ED finds unnecessary for its decision making purposes.

(c) Grantees will not be required to submit more than the original and two copies of forms required under this subpart.

(d) ED may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. ED may accept the required information from grantees in machine usable format or computer printouts instead of prescribed formats.

(e) When ED has determined that a grantee's accounting system does not meet the standards for financial management systems contained in Subpart H of this part, it may require financial reports with more frequency or more detail (or both), upon written notice to the grantee (without regard to § 74.7), until such time as the standards are met.

(f) ED may waive any report required by this subpart if not needed.

(g) ED may extend the due date for any financial report upon receiving a justfied request from the grantee.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.73 Financial Status Report.

(a) *Form.* Grantees shall use Standard Form 269, Financial Status Report, to report the Status of funds for all nonconstruction grants.

(b) *Accounting basis.* Each grantee shall report program outlays and program income on the same accounting basis, i.e., cash or accrued expenditure (accrual), which it uses in its accounting system.

(c) *Frequency.* ED may prescribe the frequency of the report for each project or program. However, the report shall not be required more frequently than quarterly except as provided in §§ 74.7 and 74.72(e). If ED does not specify the frequency of the report, it shall be submitted annually. A final report shall be required upon expiration or termination of grant support.

(d) *Due date.* When reports are required on a quarterly or semiannual basis, they shall be due 30 days after the reporting period. When required on an annual basis, they shall be due 90 days after the grant year. Final reports shall be due 90 days after the expiration or termination of grant support.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

[53 FR 8106, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 74.74 Federal Cash Transactions Report.

(a) *Form.* (1) For grants paid by letters of credit (or Treasury check advances) through any ED payment office except the Departmental Federal Assistance Financing System (DFAFS), the grantee shall submit to the payment office Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a. For grants paid by DFAFS, the grantee shall submit DFAFS Report 27, Recipient Report of Expenditures, to DFAFS.

(2) These reports will be used by the ED payment office to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment: *Provided,* That the information to be submitted is not changed in substance.

(b) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(c) *Cash in hands of secondary recipients.* When considered necessary and feasible by the ED payment office, grantees may be required to report the amount of cash subadvances in excess of three days' needs in the hands of their contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(d) *Frequency and due date.* Grantees shall submit the report no later than 15 working days following the end of each quarter. However, where a letter of credit authorizes advances at an annualized rate of one million dollars or more, the ED payment office may require the report to be submitted within 15 working days following the end of each month.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

[53 FR 8106, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 74.75 Request for Advance or Reimbursement.

(a) (1) *Advance payments.* Requests for Treasury check advance payments shall be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form is not used for drawdowns under a letter of credit or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under non-construction grants shall also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see § 74.76(a).)

(b) The frequency for submitting payment requests is treated in § 74.96.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

[53 FR 8106, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 74.76 Outlay report and request for reimbursement for construction programs.

(a) *Construction grants paid by reimbursement method.* (1) Requests for reimbursement under construction grants shall be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. ED may, however, prescribe the Request for Advance or Reimbursement form specified in § 74.75 instead of this form.

(2) The frequency for submitting reimbursement requests is treated in § 74.96

(b) *Construction grants paid by letter of credit or Treasury check advance.* (1) When a construction grant is paid by letter of credit or Treasury check advances, the grantee shall report its outlays to ED using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. ED will provide any necessary special instruction. However, frequency and due date shall be governed by § 74.73 (c) and (d).

(2) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances shall be requested on the form specified in § 74.75.

(3) ED may substitute the Financial Status Report specified in § 74.73 for the Outlay Report and Request for Reimbursement.

(c) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 74.73(b).

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

[53 FR 8106, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

Subpart J—Monitoring and Reporting of Program Performance

§ 74.80 Scope of subpart.

This subpart sets forth the procedures for monitoring and reporting program performance of recipients. These procedures are designed to place reliance on recipients to manage the day-to-day operations of their grant- and subgrant-supported activities.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.81 Monitoring by recipients.

Recipients shall monitor the performance of grant- and subgrant-supported activities. They shall review each program, function, or activity to assure that adequate progress is being made towards achieving the goals of the grant or subgrant.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.82 Performance reports under nonconstruction grants.

(a) Where ED determines that performance information sufficient to meet its programmatic needs will be available from subsequent applications, ED will require the grantee to submit a performance report only upon expiration or termination of grant support. This report will be due on the same date as the final financial Status Report unless waived by ED. Note that the "Application for Federal Assistance (Nonconstruction Programs)" prescribed by Subpart N of this part, when used to request continued support, provides information substantially equivalent to a performance report.

(b) Except as provided in paragraph (a) of this section, grantees shall submit annual performance reports unless ED requires quarterly or semiannual reports. Annual reports shall be due 90 days after the grant year; quarterly or semiannual reports shall be due 30 days after the reporting period. A final performance report shall be due 90 days after the expiration or termination of grant support. ED may extend the due date for any performance report upon receiving a justified request from the grantee. In addition, ED may waive the requirement for any performance report which is not needed.

(c) The content of performance reports shall conform to any instructions issued by the granting agency, including, to the extent appropriate to the particular grant, a brief presentation of the following for each program, function, or activity involved:

(1) A comparison of actual accomplishments to the goals established for the period. Where the output of the project or program can be readily ex-

pressed in numbers, a computation of the cost per unit of output may be required if that information will be useful.

(2) The reasons for slippage if established goals were not met.

(3) Other pertinent information including, when appropriate, analysis and explanation of unexpectedly high overall or unit costs.

(d) Grantees will not be required to submit more than the original and two copies of performance reports.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

[53 FR 8106, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 74.83 Performance reports under construction grants.

In general, awarding parties rely heavily on on-site technical inspection and certified percentage-of-completion data to keep themselves informed as to progress under construction grants. Formal performance reports to supplement those sources of information shall be required only if considered necessary by the awarding party, and in no case more frequently than quarterly.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.84 Significant developments between scheduled reporting dates.

Between the scheduled performance reporting dates, events may occur which have significant impact upon the grant- or subgrant-supported activity. In such cases, the recipient shall inform the awarding party as soon as the following types of conditions become known:

(a) Problems, delays, or adverse conditions which will materially impair the ability to attain the objective of the award. This disclosure shall be accompanied by a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(b) Favorable developments which enable meeting time schedules and goals sooner or at less cost than anticipated or producing more beneficial results than originally projected.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.85 Site visits.

Site visits may be made as necessary by representatives of ED to:

(a) Review program accomplishments and management control systems.

(b) Provided such technical assistance as may be required.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

Subpart K—Grant and Subgrant Payment Requirements

§ 74.90 Scope of subpart.

This subpart prescribes the basic standard and the methods under which ED will make grant payments to grantees.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.91 Definitions.

As used in this subpart:

"Advance by Treasury check" is a payment made by a Treasury check to a grantee, upon its periodic request or through the use of predetermined payment schedules, before payments are made by the grantee.

"Letter of credit" is an instrument certified by an authorized official which authorizes a recipient to draw funds needed for immediate disbursement in accordance with Treasury Circular No. 1075.

"Percentage of completion method" refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's rate of disbursements.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.92 Basic standard.

Methods and procedures for making payments to recipients shall minimize the time elapsing between the transfer of funds and the recipient's disbursements.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§ 74.93 Payment methods under nonconstruction grants.

(a) Letters of credit will be used to pay ED grantees when all of the following conditions exist:

(1) There is or will be a continuing relationship between the grantee and the ED payment office for at least a year and the total amount of advances to be received from the ED payment office is $120,000 or more per year,

(2) The grantee has maintained, or demonstrated to ED the willingness and ability to maintain, procedures that minimize the time elapsing between the transfer of funds from the Treasury and their disbursement by the grantee, and

(3) The grantee's financial management system meets the standards for fund control and accountability in Subpart H of this part.

(b) Advances by Treasury check will be used, in accordance with Treasury Circular No. 1075, when the grantee does not meet the requirements in paragraph (a)(1) of this section but does meet the requirements in paragraphs (a)(2) and (3) of this section.

(c) Reimbursement by Treasury check will be preferred method when the requirements of either paragraph (a)(2) or paragraph (a)(3) of this section are not met. This method may also be used when the major portion of the program is accomplished through private market financing or Federal loans, and the Federal grant assistance constitutes a minor portion of the program.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§ 74.94 Payment methods under construction grants.

(a) Reimbursement by Treasury check shall be the preferred method when the grantee does not meet the requirements specified in § 74.93(a) (2) or (3), and may be used for any ED construction grant unless ED has entered into an agreement with the grantee to use a letter of credit for all ED grants, including construction grants.

(b) When the reimbursement by Treasury check method is not used, § 74.93 (a) and (b) shall apply to the construction grant. Implementing procedures under § 74.93 (a) and (b) will be insofar as possible the same for construction grants as for nonconstruction grants awarded to the same grantee.

(c) ED will not use the percentage of completion method to pay its construction grants. The grantee may use that method to pay its construction contractor, but if it does, ED's payments to the grantee will nevertheless be based on the grantee's actual rate of disbursements.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§ 74.95 Withholding of payments.

(a) Unless otherwise required by Federal statute, payments for proper charges incurred by grantees will not be withheld unless (1) the grantee has failed to comply with Federal reporting requirements or (2) the grant is suspended pursuant to § 74.114 or (3) the grantee owes money to the United States and collection of the debt by withholding grant payments will not impair the accomplishment of the objectives of any grant program sponsored by the United States.

(b) Cash withheld for failure to comply with reporting requirements but without suspension of the grant will be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 74.114. When a debt is to be collected, ED may withhold payments or require appropriate accounting adjustments to recorded grant cash balances for which the grantee is accountable to the Federal Government, in order to liquidate the indebtedness.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§ 74.96 Requesting advances or reimbursements.

(a) If advances are made by Treasury check and the advances are not prescheduled, the grantee shall submit its requests for payment monthly. Less frequent requests are not permitted because they would result in advances covering excessive periods of time.

(b) If payments are made through reimbursement by Treasury check, the grantee may submit its requests for reimbursement monthly and may submit them more often if authorized. The grantee will be paid as promptly as possible, ordinarily within 30 days after receipt of a proper request for reimbursement.

(c) The forms for requesting advances or reimbursements are identified in Subpart I of this part.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

Subpart L—Programmatic Changes and Budget Revisions

§ 74.100 Scope and applicability of this subpart.

This subpart deals with prior approval requirements for post-award programmatic changes and budget revisions by recipients.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.101 Relationship to cost principles.

The cost principles in Appendices D and E to this part contain requirements for prior approval of certain types of cost (see § 74.176). Except when waived, those requirements apply to all grants and subgrants even if § § 74.103 through 74.106 do not.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.102 Prior approval procedures.

(a) *For grants.* When requesting a prior approval required by this subpart, grantees shall address their requests to the responsible ED grants officer. Approvals shall not be valid unless they are in writing and signed by the authorized ED official.

(b) *Timing.* Within 30 days from the date of receipt of a request for approval, the approval authority shall review the request and notify the recipient of its decision. If the request for approval is still under consideration at the end of 30 days, the approval authority shall inform the recipient in writing as to when to expect the decision.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.103 Programmatic changes.

(a) *Scope.* This section contains requirements for prior approval of departures, other than budget revisions, from approved project plans. In addition to the requirements in this section, awarding parties may require prior approval for other kinds of programmatic changes to an approved grant project.

(b) *Changes to project scope or objectives.* The recipient shall obtain prior approval for any change to the scope or objectives of the approved project. (For construction projects, any material change in approved space utilization or functional layout shall be considered a change in scope.)

(c) *Changes in key people.* The recipient of a grant or subgrant for research (or any other kind of grant or subgrant if the terms of the award make this rule applicable) shall obtain prior approval:

(1) To continue the project during any continuous period of more than 3 months without the active direction of an approved project director or principal investigator; or

(2) To replace the project director or principal investigator (or any other persons named and expressly identified as key project people in the notice of grant or subgrant award) or to permit any such people to devote substantially less effort to the project than was anticipated when the grant or subgrant was awarded.

(d) *Other programmatic changes.* The following shall require prior approval except to the extent explicitly included in the project plan as approved by the awarding party at the time of award:

(1) Transferring to a third party, by contracting or any other means, the actual performance of the substantive programmatic work. The term "substantive programmatic work" means activities which are central to carrying out the purpose of the project, and not merely incidental. Transfer of substantive programmatic work does not include purchase of supplies, materials, or equipment; acquisition of general or incidental support services; ob-

taining advice; or transfer of activities whose cost is treated as an indirect cost.

(2) Providing medical care to individuals under research grants.

CROSS-REFERENCE: See 34 CFR 75.708—Prohibition of subgrants.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.104 Budgets generally.

(a) *Definitions.* In this subpart:

(1) "Budget" means the recipient's financial plan for carrying out the project or program.

(2) "Approved budget" means a budget (including any revised budget) which has been approved by the awarding party.

(b) *Research project budgets.* For research projects, approved budgets shall not include the recipient's share of project costs.

(c) *Non-research project budgets.* For non-research projects which involve cost sharing or matching, approved budgets shall ordinarily consist of a single set of figures covering total project cost (the sum of the awarding party's share and the recipient's share). However, the awarding party may specify that the recipient's share not be included in the approved budget. In no case, however, shall the approved budget be in the form of a separate set of figures for each share.

(d) *Subdivision by programmatic segments.* Some grants encompass two or more programmatic segments (such as discrete programs, projects, functions, or types of activities). In these cases, the awarding party may require that the approved budget be subdivided to show the anticipated cost of each programmatic segment.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.105 Budget revisions—nonconstruction projects.

(a) Except as provided in paragraph (b) of this section, the recipient of a grant or subgrant having an approved budget shall obtain prior approval for any budget revision which will:

(1) Involve transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or

(2) Involve transfer of amounts previously budgeted for student support (tuition waivers, stipends, and other payments to or for trainees), or

(3) Result in a need for the award of additional funds, e.g., an increase in the base upon which indirect costs are calculated which will increase allocable indirect costs and result in a claim for a supplementary award.

(b) Any or all of the prior approval requirements in paragraph (a) of this section may be waived by the awarding party.

(c) Except as provided in §§ 74.107 and 74.176, other budget changes under nonconstruction grants do not require approval.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.106 Budget revisions—construction projects.

Unless provided otherwise by the terms of the grant or subgrant, revisions to construction project budgets do not require approval.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.107 Construction and nonconstruction work under the same grant.

When a grant provides support for both construction and nonconstruction work, the awarding party may require prior approval before any fund or budget transfers between the two types of work.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.108 Authorized funds exceeding needs.

The recipient shall notify the awarding party promptly whenever the amount of grant or subgrant authorized funds is expected to exceed needs by more than $5,000 or 5 percent of the grant or subgrant, whichever is greater. This notification will not be required under continuing grants or subgrants if the application for the next period's funding will include an estimate of what the unobligated balance of authorized funds will be at the end of the current period.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

Subpart M—Grant and Subgrant Closeout, Suspension, and Termination

§ 74.110 Definitions.

Grant closeout means the process by which ED determines that all applicable administrative actions and all required work of the grant have been completed by the grantee and ED.

Suspension of a grant means temporary withdrawal of the grantee's authority to obligate grant funds pending corrective action by the grantee or a decision to terminate the grant.

Termination of a grant means permanent withdrawal of the grantee's authority to obligate previously awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee. "Termination" does not include:

(a) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period;

(b) Refusal by ED to extend a grant or award additional funds (such as refusal to make a competing or noncompeting continuation, renewal, extension, or supplemental award);

(c) Withdrawal of the unobligated balance as of the expiration of a grant;

(d) Annulment, i.e., voiding, of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.111 Closeout.

(a) Each grant shall be closed out as promptly as is feasible after expiration or termination.

(b) In closing out ED grants, the following shall be observed:

(1) Upon request, ED shall promptly pay the grantee for any allowable reimbursable costs not covered by previous payments.

(2) The grantee shall immediately refund or otherwise dispose of, in accordance with instructions from ED, any unobligated balance of cash advanced to the grantee.

(3) The grantee shall submit, within 90 days of the date of expiration or termination, all financial, performance, and other reports required by the terms of the grant. ED may extend the due date for any report upon receiving a justified request from the grantee, and may waive any report which is not needed.

(4) ED shall make a settlement for any upward or downward adjustment of the Federal share of costs, to the extent called for by the terms of the grant.

(c)(1) The closeout of a grant does not affect the retention period for, or Federal rights of access to, grant records. See Subpart D of this part.

(2) If a grant is closed out without audit, ED retains the right to disallow and recover an appropriate amount after fully considering any recommended disallowances resulting from an audit which may be conducted later.

(3) The closeout of a grant does not affect the grantee's responsibilities with respect to property under Subpart O of this part, or with respect to any program income for which the grantee is still accountable under Subpart F of this part.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.112 Amounts payable to the Federal Government.

For each grant, the following sums shall constitute a debt or debts owed by the grantee to the Federal Government, and shall, if not paid upon demand, be recovered from the grantee or its successor or assignees by setoff or other action as provided by law:

(a) Any grant funds paid to the grantee by the Federal Government in excess of the amount to which the grantee is finally determined to be entitled under the terms of the grant;

(b) Any interest or other investment income earned on advances of grant funds which is due the Federal Government pursuant to § 74.47;

(c) Any royalties or other special classes of program income which, under the terms of the grant, are required to be remitted to the Federal Government (see Subpart F of this part);

(d) Any amounts due the Federal Government under Subpart O of this part; and

(e) Any other amounts finally determined to be due the Federal Government under the terms of the grant.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.113 Violation of terms.

(a) When a grantee has materially failed to comply with the terms of a grant, ED may suspend the grant, in accordance with § 74.114, terminate the grant for cause, as provided in § 74.115, or take such other remedies as may be legally available and appropriate in the circumstances.

(b) If a project or program is supported over two or more funding periods, a grant may be suspended or terminated in the current period for failure to submit a report still due from a prior period.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.114 Suspension.

(a) When a grantee has materially failed to comply with the terms of a grant, ED may, upon reasonable notice to the grantee, suspend the grant in whole or in part. The notice of suspension will state the reasons for the suspension, any corrective action required of the grantee, and the effective date. The suspension may be made effective at once if a delayed effective date would be unreasonable considering ED's responsibilities to protect the Federal Government's interest. Suspensions shall remain in effect until the grantee has taken corrective action satisfactory to ED or given evidence satisfactory to ED that such corrective action will be taken, or until ED terminates the grant.

(b) New obligations incurred by the grantee during the suspension period will not be allowed unless ED expressly authorizes them in the notice of suspension or an amendment to it. Necessary and otherwise allowable costs which the grantee could not reasonably avoid during the suspension period will be allowed if they result from obligations properly incurred by the grantee before the effective date of the suspension and not in anticipation of suspension or termination. At the discretion of ED, third-party in-kind contributions applicable to the suspension period may be allowed in satisfaction of cost sharing or matching requirements.

(c) Appropriate adjustments to payments under the suspended grant will be made either by withholding subsequent payments or by not allowing the grantee credit for disbursements made in payment of unauthorized obligations incurred during the suspension period.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.115 Termination.

(a) *Termination for cause.* ED may terminate any grant in whole, or in part, at any time before the date of expiration, whenever ED determines that the grantee has materially failed to comply with the terms of the grant. ED shall promptly notify the grantee in writing of the determination and the reasons for the termination, together with the effective date.

(b) *Termination on other grounds.* Except as provided in paragraph (a) of this section, grants may be terminated in whole or in part only as follows:

(1) By ED with the consent of the grantee, in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial terminations, the portion to be terminated, or

(2) By the grantee, upon written notification to ED, setting forth the reasons for such termination, the effective date, and in the case of partial terminations, the portion to be terminated. However, if, in the case of a partial termination, ED determines that the remaining portion of the grant will not accomplish the purposes for which the grant was made, ED may terminate the grant in its entirety under either paragraph (a) or paragraph (b)(1) of this section.

(c) *Termination settlements.* When a grant is terminated, the grantee shall not incur new obligations for the terminated portion after the effective date, and shall cancel as many outstanding obligations as possible. ED will allow full credit to the grantee for the Federal share of the noncancellable obligations properly incurred by the grantee prior to termination.

Subpart N—Forms for Applying for Grants

Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.120 Scope of subpart.

(a) This subpart is not applicable to mandatory or formula grant programs which do not require applicants to apply to ED for funds on a project basis.

(b) ED may prescribe the form of applications by nongovernmental organizations (including hospitals and institutions of higher education operated by a government), and may use a standard facesheet for these applications.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.121 [Reserved]

§ 74.122 Preapplications for Federal assistance.

The purposes of preapplications shall be to:

(a) Establish communications between the applicant and ED;

(b) Determine the applicant's eligibility;

(c) Determine how well the project can compete with similar applications from others in order to discourage proposals which have little or no chance for Federal funding before applicants incur significant expenditures for preparing an application.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.123 Notice of preapplication review action.

(a) ED will inform applicants of the results of the review of the preapplications submitted to them.

(b) ED will send a notice to the applicant ordinarily within 45 days of the receipt of the preapplication form.

(c) If the review cannot be made within 45 days, the applicant will be informed by letter as to when the review will be completed.

§§ 74.124—74.126 [Reserved]

§ 74.127 Authorized forms and instructions for nongovernmental organizations.

Nongovernmental organizations shall use application forms and instructions prescribed by ED, except that the facesheet of such applications shall be standard form 424 for grants under programs covered by Executive Order 12372.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

Subpart O—Property

General

§ 74.130 Scope and applicability of this subpart.

(a) Except as explained in paragraphs (c), (d), and (e) of this section this subpart applies to real property, equipment, and supplies acquired with grant support. To be considered acquired with grant support, some or all of the property's acquisition cost must be a direct cost under the grant, a subgrant, or a cost-type contract and must be either borne by grant funds or counted toward satisfying a grant cost-sharing or matching requirement.

(b) This subpart also deals with inventions, patents, and copyrights arising out of activities assisted by a grant or subgrant.

(c) This subpart does not apply to:

(1) Property for which only depreciation or use allowances are charged;

(2) Property donated entirely as a third-party in-kind contribution (as defined in § 74.51); or

(3) Equipment or supplies acquired primarily for sale or rental rathe than for use.

(d) Equipment or supplies acquired by a contractor under a grant or subgrant shall be subject to this subpar only if, by terms of the contract, title vests in the grantee or subgrantee.

(e) For research grants that are subject to an institutional cost-sharing agreement (see § 74.50(b)), real property, equipment, and supplies shall be subject to this subpart only if at least some part of the acquisition cost is borne as a direct cost by Federal grant funds.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.131 Prohibition against additional requirements.

Recipients may follow their own property management policies and procedures: *Provided*, They observe the requirements of this subpart. Awarding parties may not impose on recipients property requirements (including property reporting requirements) not authorized by this subpart, unless specifically required by Federal statutes or Executive Orders.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.132 Definitions.

As used in this subpart:

Acquisition of property includes purchase, construction, or fabrication of property, but does not include rental of property or alterations and renovations of real property.

Acquisition cost of an item of purchased equipment means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the equipment usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance shall be included in or excluded from the unit acquisition cost in accordance with the regular accounting practices of the organization purchasing the equipment. If the item is acquired by trading in another item and paying an additional amount, "acquisition cost" means the amount received for trade-in plus the additional outlay.

Amount received for trade-in of an item of equipment traded in for replacement equipment means the amount that would have been paid for the replacement equipment without a trade-in minus the amount paid with the trade-in. The term refers to the actual difference, not necessarily the trade-in value shown on an invoice.

Equipment means tangible personal property having a useful life of more than one year and an acquisition cost of $300 or more per unit except that organizations subject to Cost Accounting Standards Board (CASB) regulations may use the CASB standard of $500 or more per unit and useful life of two years. An organization may use its own definition of equipment: *Provided*, That such definition would at least include all tangible personal property as defined herein.

Personal property means property of any kind except real property. It may be tangible—having physical existence, or intangible—having no physical existence, such as patents, inventions, and copyrights.

Real property means land, including land improvements, structures and appurtenances thereto, but excluding movable machinery and equipment.

Replacement equipment means property acquired to take the place of other equipment. To qualify as replacement equipment, it must serve the same function as the equipment replaced and must be of the same nature or character, although not necessarily the same model, grade, or quality.

Supplies means all tangible personal property other than equipment.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.133 Title to real property, equipment, and supplies.

Subject to the obligations and conditions set forth in this subpart, title to real property, equipment, and supplies acquired under a grant or subgrant shall vest, upon acquisition, in the grantee or subgrantee respectively.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

REAL PROPERTY

§ 74.134 Real property.

Except as otherwise provided by Federal statutes, real property to which this subpart applies shall be subject to the following requirements, in addition to any other requirements imposed by the terms of the grant:

(a) *Use.* The property shall be used for the originally authorized purpose as long as needed for that purpose. When no longer so needed, approval of the Secretary may be requested to use the property for other purposes. Use for other purposes shall be limited to:

(1) Projects or programs supported by other Federal grants or assistance agreements.

(2) Activities not supported by other Federal grants or assistance agreements but having, nevertheless, purposes consistent with those of the legislation under which the original grant was made.

(b) *Transfer of title.* Approval may be requested from ED to transfer title to an eligible third party for continued use for authorized purposes in accordance with paragraph (a) of this section. If approval is permissable under Federal statutes and is given, the terms of the transfer shall provide that the transferee shall assume all the rights and obligations of the transferor set forth in this subpart or in other terms of the grant or subgrant.

(c) *Disposition.* When the real property is no longer to be used as provided in paragraphs (a) and (b) of this section, the disposition instructions of ED shall be followed. Those instructions will provide for one of the following alternatives:

(1) The property shall be sold and the Federal Government shall be paid an amount computed by multiplying the Federal share of the property (see § 74.142) times the proceeds from sale (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). Proper sales procedures shall be used that provide for competition to the extent practicable and result in the highest possible return.

(2) The recipient shall have the option either of selling the property in accordance with paragraph (c)(1) of this section or of retaining title. If title is retained, the Federal Government shall be paid an amount computed by multiplying the market value of the property by the Federal share of the property.

(3) The recipient shall transfer the title to either the Federal Government or an eligible non-Federal party named by ED. The grantee shall be entitled to be paid an amount computed by multiplying the market value of the property by the non-Federal share of the property. If the property belonged to a subgrantee, see § 74.143 for subgrantee's share.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

EQUIPMENT AND SUPPLIES

§ 74.135 Exemptions for equipment and supplies subject to certain statutes.

(a) Some Federal statutes, in certain circumstances, permit title to equipment or supplies acquired with grant funds to vest in the recipient without further obligation to the Federal Government or on such terms and conditions as deemed appropriate. An example of such a statute is the Federal Grant and Cooperative Agreement Act of 1977, Pub. L. 95-224, which provides this authority for equipment and supplies purchased with the funds of grants (and Federal contracts and cooperative agreements) for the conduct of basic or applied scientific research at nonprofit institutions of higher education or at nonprofit organizations whose primary purpose is the conduct of scientific research.

(b) If equipment is subject to a statute of the kind described in paragraph (a) of this section, it shall be exempt from the requirements in the remaining sections of this subpart. However, an item of such equipment having a unit acquisition cost of $1,000 or more shall be subject to § 74.136, concerning rights to require transfer, and, while subject to such a right, to the rules on replacement in § 74.138.

(c) If supplies are subject to a statute of the kind described in paragraph (a) of this section, they shall be exempt from all provisions of the remainder of this subpart which would otherwise apply.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§ 74.136 Rights to require transfer of equipment.

(a) *ED right.* For items of equipment having a unit acquisition cost of $1,000 or more, ED shall have the right to require transfer of the equipment (including title) to the Federal Government or to an eligible non-Federal party named by ED. This right will normally be exercised by ED only if the project or program for which the equipment was acquired is transferred from one grantee to another. The right shall be subject to the following conditions:

(1) In order for ED to exercise the right, a specific notice that it is exercising the right or considering doing so must be issued no later than the 120th day after the end of ED grant support for the project or program for which the equipment was acquired. Furthermore:

(i) If the equipment is eligible for the exemptions in § 74.135 and ceases to be needed for the project or program for which it was acquired while the project or program is still being performed by the recipient, the notice must have been received by the grantee while the equipment was still needed for that project or program.

(ii) If the equipment is not eligible for those exemptions, the notice must have been received by the grantee before other permissible disposition of the equipment took place in accordance with § 74.139.

(2) If the right is exercised, the grantee shall be entitled to be paid any reasonable, resulting shipping or storage costs incurred, plus an amount computed by multiplying the market value of the equipment by the non-Federal share of the equipment. (See §§ 74.142 and 74.143.)

(b) *Equipment lists.* If at any time an awarding party is considering exercising its right to require transfer of equipment, it may require the recipient to furnish it a listing of all items of equipment that are subject to the right. This will enable the awarding party to determine which items, if any, should be transferred.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§ 74.137 Use of equipment.

(a) *Basic rule.* Equipment which has not been transferred under § 74.136 shall be used by the recipient in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original project or program, the recipient shall use the equipment, if needed, in other projects or programs currently or previously sponsored by the Federal Government, in the following order of priority:

(1) Projects or programs currently or previously sponsored by ED.

(2) Projects or programs currently or previously sponsored by other Federal agencies.

(b) *Shared use.* If equipment is being used less than full time in the project or program for which it was originally acquired, the recipient shall make it available for use in other projects or programs currently or previously sponsored by the Federal Government: *Provided,* Such other use will not interfere with the work on the original project or program. First preference for such other use shall be given to other projects or programs sponsored by ED.

(c) *Use by other recipients.* When the recipient can no longer use the equipment as required by paragraph (a) of this section, it may voluntarily make the equipment available for use on projects or programs currently or previously sponsored by the Federal Government which the recipient is supporting through subgrants or through non-Federal grants. If the recipient is a subgrantee, it may also voluntarily make the equipment available for use on projects or programs currently or previously sponsored by the Federal Government which are being conducted or supported by the grantee.

(d) *Other uses.* Unless ED provides otherwise, while equipment is being used as described in the preceding paragraphs of this section, it may also be used part time for other purposes. However, use as described in those paragraphs shall be given priority over other uses.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.138 Replacement of equipment.

(a) Equipment may be exchanged for replacement equipment if needed. The replacement may take place either through trade-in or through sale and application of the proceeds to the acquisition cost of the replacement equipment. In either case, the transaction must be one which a prudent person would make in like circumstances.

(b) If an additional outlay to acquire the replacement equipment is charged as a direct cost to either Federal funds or required cost-sharing or matching under a Federal award, the replacement equipment shall be subject to whatever property requirements or exemptions are applicable to that award. If the award is a grant from ED the full acquisition cost of the replacement equipment shall determine which provisions of this subpart apply.

(c) For any replacement not covered by paragraph (b) of this section, the provisions of this subpart applicable to the equipment replaced shall carry over to the replacement equipment. However, none of the provisions of this subpart shall carry over if (1) the Federal share of the equipment replaced was 10 percent or less or (2) the product of that share times the amount received for trade-in or sale is $100 or less.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.139 Disposition of equipment.

When original or replacement equipment is no longer to be used in projects or programs currently or previously sponsored by the Federal Government, disposition of the equipment shall be made as follows:

(a) *Equipment with a unit acquisition cost of less than $1,000 and equipment with no further use value.* The equipment may be retained, sold, or otherwise disposed of, with no further obligation to the Federal Government.

(b) *All other equipment.* (1) The equipment may be retained or sold, and the Federal Government shall have a right to an amount calculated by multiplying the current market value or the proceeds from sale by the Federal share of the equipment (see § 74.142). If part of the Federal share in the equipment came from an award under which the exemptions in § 74.135 were applicable, the amount due shall be reduced pro rata. In any case, if the equipment is sold, $100 or 10 percent of the total sales proceeds, whichever is greater, may be deducted and retained from the amount otherwise due for selling and handling expenses.

(2) If the grantee's project or program for which or under which the equipment was acquired is still receiving grant support from the same Federal program and if ED approves, the net amount due may be used for allowable costs of that project or program. Otherwise, the net amount must be remitted to the granting agency by check.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.140 Equipment management requirements.

Procedures for managing equipment (including replacement equipment) until transfer, replacement, or disposition takes place shall, as a minimum, meet the following requirements:

(a) Property records shall be maintained accurately. (Retention and access requirements for these records are explained in Subpart D of this part.) For each item of equipment, the records shall include:

(1) A description of the equipment, including manufacturer's model number, if any.

(2) An identification number, such as the manufacturer's serial number.

(3) Identification of the grant unde which the recipient acquired th equipment.

(4) The information needed to calculate the Federal share of the equipment. (See § 74.142.)

(5) Acquisition date and unit acquis tion cost.

(6) Location, use, and condition of the equipment and the date the information was reported.

(7) All pertinent information on the ultimate transfer, replacement, or disposition of the equipment.

(b) A physical inventory of equipment shall be taken and the results reconciled with the property records at least once every 2 years to verify the existence, current utilization, and continued need for the equipment. A statistical sampling basis is acceptable. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the differences.

(c) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented.

(d) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(e) Where equipment is to be sold and the Federal Government is to have a right to part or all of the proceeds, selling procedures shall be established which will provide for competition to the extent practicable and result in the highest possible return.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

[53 FR 8106, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 74.141 Supplies.

(a) If supplies exceeding $1,000 in total aggregate market value are left over upon termination or expiration of the grant or subgrant for which they were acquired and the supplies are not needed for any project or program currently or previously sponsored by the Federal Government, the grant shall be credited by an amount computed by multiplying the Federal share of the supplies times the current market value or, if the supplies are sold, the proceeds from sale. If the supplies are sold, 10 percent of the proceeds may be deducted and retained from the credit, for selling and handling expenses.

(b) For possible exemptions from this section, see § 74.135.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

Federal Share of Real Property, Equipment, and Supplies

§ 74.142 Federal share of property.

Several sections of this subpart require a determination of the Federal (or non-Federal) share of real property, equipment, or supplies. In making such a determination, the following principles shall be observed:

(a) *General.* (1) Except as explained in the succeeding paragraphs of this section, the Federal share of the property shall be the same percentage as the Federal share of the acquiring party's total costs under the grant during the grant or subgrant year (or other funding period) to which the acquisition cost of the property was charged. For this purpose, "costs under the grant" means allowable costs which are either borne by the grant or counted towards satisfying a cost-sharing or matching requirement of the grant. Only costs are to be counted—not the value of third-party in-kind contributions.

(2) If the property is acquired by a subgrantee, the Federal share of the subgrantee's costs under the grant and hence of the property shall be calculated by multiplying the Federal share of the grantee's costs by the latter's share of the subgrantee's costs. For example, if the Federal share of a grantee's costs is 50 percent and the subgrant bears only 50 percent of a subgrantee's costs, then the Federal share of that subgrantee's costs (and of the property acquired by that subgrantee) is 25 percent.

(b) *Property acquired only partly under a grant.* (1) Sometimes only a part of the acquisition cost of an item of property is borne as a direct cost by the grant or counted as a direct cost towards a cost-sharing or matching requirement. The remainder might, for example, represent voluntary cost sharing or matching, or it might be charged to a different activity. Occasionally, the amount paid for the property is only a part of its value, and the remainder is donated as an in-kind contribution by the party that provided the property.

(2) To calculate the Federal share of such property, first determine the Federal share of the acquiring party's total costs under the grant, as explained in the paragraph (a) of this section. Then multiply that share by the percentage of the property's acquisition cost (or its market value, if the item was partly donated) which was borne as a direct cost by the grant or counted as a direct cost towards a cost-sharing or matching requirement.

(c) *Replacement equipment.* The Federal share of replacement equipment shall be calculated as follows:

(1) *Step 1.* Determine the Federal share (percentage) of the equipment replaced.

(2) *Step 2.* Determine the percentage of the replacement equipment's cost that was covered by the amount received for trade-in or the sales proceeds from the equipment replaced.

(3) *Step 3.* Multiply the step 1 percentage by the step 2 percentage.

(4) *Step 4.* If an additional outlay for the replacement equipment was charged as a direct cost either to ED grant funds or to required cost-sharing or matching funds, calculate the Federal share attributable to that additional outlay as explained in paragraph (b)(2) of this section. Add that additional percentage to the step 3 percentage.

(d) *Institutional cost-sharing agreements.* If a grant is subject to an institutional cost-sharing agreement (see § 74.130(e)), the Federal share of property acquired under the grant shall be calculated as though there were no cost-sharing requirements applicable to the grant (that is, as if all the grantee's cost sharing were voluntary).

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.143 Subgrantee's share of market value or sales proceeds.

Where this subpart requires a sharing of the market value or sales proceeds of property acquired under a subgrant, the non-Federal share shall be proportionally divided between the grantee and the subgrantee. The subgrantee shall be entitled to the amount it would have received or retained if the award to it had been made directly by the Federal Government. The remainder of the non-Federal share shall belong to the grantee.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

INTANGIBLE PERSONAL PROPERTY

§ 74.144 Inventions and patents.

ED's regulations on inventions and patents arising out of activities assisted by a grant are set forth in Parts 6 and 8 of this title.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.145 Copyrights.

(a) *Works under grants.* Unless otherwise provided by the terms of the grant, when copyrightable material is developed in the course of or under a grant, the grantee is free to copyright the material or permit others to do so.

(b) *Works under subgrants.* Unless otherwise provided by the terms of the grant or subgrant, when copyrightable material is developed in the course of or under a subgrant, the subgrantee is free to copyright the material or permit others to do so.

(c) *ED rights.* If any copyrightable material is developed in the course of or under an ED grant or subgrant, ED shall have a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use, and to authorize others to use, the work for Federal Government purposes.

(d) *Exemption of student-developed works.* ED awards training grants and other kinds of grants under which individuals are provided stipends or other financial assistance for the primary purpose of aiding them to further their education or training. Except as provided by the terms of the grant, copyrightable material developed by an individual or group of individuals in the course of education or training pursued with such assistance shall be subject to the ED right described in paragraph (c) of this section, unless the development of the material also receives other forms of support under the same or another ED grant (such as a research grant).

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

Subpart P—Procurement Standards

§74.160 Scope of subpart; terminology.

(a) This subpart contains standards for use by recipients in establishing procedures for the procurement of supplies, equipment, construction, and other services whose cost is borne in whole or in part as a direct cost by Federal grant funds.

(b) No additional procurement standards or requirements shall be imposed by awarding parties upon recipients unless specifically required by Federal statutes or Executive Orders.

(c) As used in this subpart:

(1) "Formal advertising" refers to that procurement method which involves adequate purchase description, sealed bids, and public opening of bids.

(2) "Negotiation" refers to any method of procurement other than formal advertising.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§74.161 General.

(a) Recipients may use their own procurement policies: *Provided*, That procurements subject to this subpart are made in accordance with the standards in this subpart.

(b) The standards in this subpart do not relieve the recipient of the contractual responsibilities arising under its contracts. The recipient is the responsible authority, without recourse to ED, regarding issues arising out of its procurements. This includes but is not limited to: Disputes, claims, protests of award, source evaluation, or other matters of a contractual nature. Matters concerning violation of law are to be referred to such local, State, or Federal authority as may have proper jurisdiction.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§74.162 Code of conduct.

(a) The recipient shall maintain a code of standards of conduct that shall govern the performance of its officers, employees or agents engaged in the awarding and administration of contracts that are subject to this subpart. The code or standards shall provide for disciplinary actions to be applied for violations of the code or standards by the recipient's officers, employees, or agents. For governmental recipients, such disciplinary actions are required only to the extent otherwise permissible under the Government's laws, rules, or regulations. To the extent permissible under its laws, rules, or regulations, the governmental recipient shall also provide for actions to be taken against contractors or their agents who wrongfully take part in a violation of the code or standards of conduct.

(b) The recipient's officers, employees or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or potential contractors. This is not intended to preclude bona-fide institutional fund-raising activities.

(c) No employee, officer, or agent of a nongovernmental recipient shall participate in the selection, award, or administration of a contract subject to this subpart where, to his or her knowledge, any of the following has a financial interest in that contract:

(1) The employee, officer, or agent;

(2) Any member of his or her immediate family;

(3) His or her partner;

(4) An organization in which any of the above is an officer, director, or employee;

(5) A person or organization with whom any of the above individuals is negotiating or has any arrangement concerning prospective employment.

(Authority: 20 U.S.C. 3474; OMB Circular A–110)

§74.163 Free competition.

(a) All procurement transactions shall be conducted in a manner to provide, to the maximum extent practicable, open and free competition.

(b) The recipient should be alert to organizational conflicts of interest or noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In particular, a contractor that develops or drafts specifications, requirements, a statement of work, an invitation for bids or a request for proposals for a particular procurement by a nongovernmental recipient should be excluded from competing for that procurement except when, upon request of the recipient, ED waives this requirement for a particular procurement.

(c) Solicitations shall clearly set forth all requirements that the bidder/offerer must fulfill in order for his bid/offer to be evaluated. Awards shall be made to the responsible bidder/offeror whose bid/offer is responsive to the solicitation and is most advantageous to the recipient, price and other factors considered. Factors such as discounts, transportation costs, and taxes may be considered in determining the lowest bid. Any and all bids/offers may be rejected when it is in the recipient's interest to do so, and, in the case of governmental recipients, such rejections are in accordance with the government's applicable law, rules, or regulations.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.164 Procedural requirements.

The recipient shall establish procurement procedures which provide for, as a minimum, the following:

(a) Proposed procurement actions shall follow a procedure to assure that unnecessary or duplicative items are not purchased. Where appropriate, an analysis shall be made of lease and purchase alternatives to determine which would be the most economical, practical procurement.

(b) Solicitations for goods and services shall be based upon a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. "Brand name or equal" description may be used as a means to define the performance of other salient requirements of a procurement, and when so used the specific features of the named brand which must be met by bidders/offerors should be clearly specified.

(c) Where applicable, section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) shall be observed.

(d) Positive efforts shall be made by procuring parties to utilize small business and minority-owned business sources of supplies and services. Such efforts should allow these sources the maximum feasible opportunity to compete for contracts subject to this subpart.[1]

(e) The type of procuring instruments used—e.g., fixed-price contracts, cost reimbursable contracts, purchase orders, incentive contracts—shall be determined by the recipient but must be appropriate for the particular procurement and for promoting the best interest of the grant project or program involved. The "cost-plus-a-percentage-of-cost" method of contracting shall not be used.

(f) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources.

(g) The terms of the grant may require that the following be submitted for prior approval of ED if the aggregate expenditure is expected to exceed $5,000: (1) Any proposed sole source contract and (2) any contract which a nongovernmental recipient proposes to award after seeking competition but receiving only one bid or proposal.

(h) Non governmental recipients should make some form of price or cost analysis in connection with every negotiated procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost proposed by the offeror to determine reasonableness, allocability and allowability.

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[1] Advice and assistance regarding the use of small or minority businesses may be obtained from the following Federal organizations:

1. The Small Business Administration and its field offices.

2. The Office of Minority Business Enterprise, Department of Commerce.

3. The Office for Civil Rights, ED.

(i) Procurement records and files for purchases in excess of $10,000 shall include the following:

(1) Basis for contractor selection;

(2) Justification for lack of competition when competitive bids or offers are not obtained;

(3) Basis for award cost or price.

(j) A system for contract administration shall be maintained to ensure contractor conformance with terms, conditions and specifications of the contract, and to ensure adequate and timely followup of all purchases.

§ 74.165 [Reserved]

§ 74.166 Contract provisions.

(a) *Scope.* This section contains requirements relating to provisions that must be included in contracts that are subject to this part. The requirements shall also apply to subcontracts of any tier under such contracts, and the term "contracts" in this section shall be construed as including subcontracts.

(b) *General.* All contracts shall contain sufficient provisions to define a sound and complete agreement.

(c) *Administrative remedies for violations.* Contracts in excess of $10,000 shall contain contractual provisions or conditions that will allow for administrative, contractual or legal remedies in instances in which contractors violate or breach contract terms, and provide for such remedial actions as appropriate.

(d) *Termination provisions.* Contracts in excess of $10,000 shall contain suitable provisions for termination by the party awarding the contract, including the manner by which termination will be effected and the basis for settlement. These contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(e) *Executive Order 11246.* Where applicable, construction contracts in excess of $10,000 shall contain a provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR Part 60).

(f) *Copeland Act.* Contracts in excess of $2,000 for construction or repair shall include a provision for compliance with the Copeland "Anti-Kick-Back Act" (18 U.S.C. 874) as supplemented in Department of Labor regulation (29 CFR Part 3). All suspected or reported violations shall be reported to the granting agency by the grantee.

(g) *Davis-Bacon Act.* When required by the Federal legislation governing the grant program, all construction contracts in excess of $2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) as supplemented by Department of Labor regulations (29 CFR Part 5). All suspected or reported violations shall be reported to the granting agency by the grantee.

(h) *Contract Work Hours and Safety Standards Act.* All contracts subject to the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 et seq.) shall include a provision requiring the contractor to comply with the applicable sections of the act and the Department of Labor's supplementing regulations (29 CFR Parts 5 and 1926).

(i) *Inventions and patents.* Contracts which may give rise to inventions subject to Part 6 of this title shall include a provision requiring compliance with those parts.

(j) *Access to Records.* Contracts that are subject to Subpart D of this part shall include a provision reflecting § 74.24(c) on rights of access to the contractor's records.

(k) *Clean Air and Water Acts.* Contracts in excess of $100,000 shall contain provisions requiring compliance with all applicable standards, orders, or regulations issued pursuant to the Clean Air Act as amended (42 U.S.C. 1857 et seq.) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 et seq.). Violations shall be reported in writing to the appropriate regional office of the Environmental Protection Agency, and a copy of the report shall be submitted to the granting agency. (See 40 CFR Part 15 for relevant regulations of the Environmental Protection Agency.)

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

Subpart Q—Cost Principles

§ 74.170 Scope of subpart.

This subpart identifies the principles to be used in determining costs applicable to grants, subgrants, and cost-type contracts under grants and subgrants.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.171 [Reserved]

§ 74.172 Institutions of higher education.

(a) *Research and development.* The principles for determining the allowable costs of research and development work performed by institutions of higher education (other than for-profit institutions) are in Part I of Appendix D to this part.

(b) *Training and other educational services.* The principles for determining the allowable costs of training and other educational services provided by institutions of higher education (other than for-profit institutions) are in Part II of Appendix D to this part.

(c) *Other activities.* Appendix D to this part shall be used as a guide for determining the allowable costs of other activities conducted by institutions of higher education (other than for-profit institutions).

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.173 Hospitals.

(a) *Research and development.* The principles for determining the allowable costs of research and development work performed by hospitals are in Appendix E to this part.

(b) *Other activities.* Appendix E to this part shall be used as a guide for determining the allowable costs of other activities conducted by hospitals.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.174 Other nonprofit organizations.

A nonprofit organization, other than an institution of higher education or a hospital, shall comply with the cost principles stated in OMB Circular A-122, as published in the FEDERAL REGISTER of July 8, 1980 at 45 FR 46022 and revised in the FEDERAL REGISTER on April 27, 1984 at 49 FR 18260, with corrections published on May 8, 1984 at 49 FR 19588.

(Approved by the Office of Management and Budget under control number 1880-0509)

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.175 Subgrants and cost-type contracts.

(a) The cost principles applicable to a subgrantee or cost-type contractor under an ED grant will not necessarily be the same as those applicable to the grantee. For example, where a State government awards a subgrant or cost-type contract to an institution of higher education, Appendix D to this part would apply to the costs incurred by the institution of higher education, even though OMB Circular A-87 would apply to the costs incurred by the State.

(b) The principles to be used in determining the allowable costs of work performed by for-profit organizations under cost-type contracts awarded to them under ED grants are in 48 CFR Chapter 34.

(Authority: 20 U.S.C. 3474; OMB Circular A—110)

§ 74.176 Costs allowable with approval.

Each set of cost principles identifies certain costs that, in order to be allowable, must be approved by the awarding party. Other costs do not require approval. The following procedures govern approval of these costs.

(a) When costs are treated as indirect costs, acceptance of the costs as part of the indirect cost rate shall constitute approval.

(b)(1) When the costs are treated as direct costs, they must be approved in advance by the awarding party.

(2) If the costs are specified in the budget, approval of the budget shall constitute approval of the costs.

(3) If the costs are not specified in the budget, or there is no approved budget, the recipient shall obtain specific prior approval in writing from the awarding party. For this purpose the prior approval procedures of § 74.102 shall be followed, except that for formula or mandatory grants, ED's written approval may be signed by any authorized ED official.

(c) The awarding party may waive or conditionally waive the requirement for its approval of the costs. Such a waiver shall apply only to the requirement for approval. If, upon audit or otherwise, it is determined that the costs do not meet other requirements or tests for allowability specified by the applicable cost principles, such as reasonableness and necessity, the costs may be disallowed.

(d) In the case of cost-type contracts, no approval shall be given which is inconsistent with the purpose or the terms of the Federal grant.

(Authority: 20 U.S.C. 3474; OMB Circular A-110)

APPENDIX A—C [RESERVED]

APPENDIX D—PART I—PRINCIPLES FOR DETERMINING COSTS APPLICABLE TO RESEARCH AND DEVELOPMENT UNDER GRANTS AND CONTRACTS WITH EDUCATIONAL INSTITUTIONS

A. PURPOSE AND SCOPE

1. *Objectives.* This appendix provides principles for determining the costs applicable to research and development work performed by educational institutions under grants from and contracts with the Federal Government. These principles are confined to the subject of cost determination and make no attempt to identify the circumstances or dictate the extent of agency and institutional participation in the financing of a particular research or development project. The principles are designed to provide recognition of the full allocated costs of such research work under generally accepted accounting principles. No provision for profit or other increment above cost is intended.

2. *Policy guides.* The successful application of these principles requires development of mutual understanding between representatives of universities and of the Federal Government as to their scope, implementation, and interpretation. It is recognized that—

a. The arrangements for agency and institutional participation in the financing of a research and development project are properly subject to negotiation between the agency and the institution concerned in accordance with such Government-wide criteria as may be applicable.

b. Each college and university, possessing its own unique combination of staff, facilities, and experience, should be encouraged to conduct research in a manner consonant with its own academic philosophies and institutional objectives.

c. Each institution, in the fulfillment of its obligations, should employ sound management practices.

d. The application of the principles established herein should require no significant changes in the generally accepted accounting practices of colleges and universities and standards herein provided on a consistent basis. Where wide variations exist in the treatment of a given cost item among institutions, the reasonableness and equitableness of such treatments will be fully considered during the rate negotiations and audit.

3. *Application.* The Department of Education will apply these principles and related policy guides in determining the costs incurred for such work under any type of research and development agreement. These principles should also be used as a guide in the pricing of fixed-price contracts or lump sum agreements.

B. DEFINITION OF TERMS

1. *Organized research* means all research activities of an institution that are separately budgeted and accounted for.

2. *Departmental research* means research activities that are not separately budgeted and accounted for. Such research work, which includes all research activities not encompassed under the term "organized research," is regarded for purposes of this document as a part of the instructional activities of the institution.

3. *Research agreement* means any valid arrangement to perform federally sponsored research, including grants, cost-reimbursement type contracts, cost-reimbursement type subcontracts, and fixed-price contracts and subcontracts for research.

4. *Other institutional activities* means all organized activities of an institution not directly related to the instruction and research functions, such as residence halls, dining halls, student hospitals, student unions, intercollegiate athletics, bookstores, faculty housing, student apartments, guest houses, chapels, theaters, public museums, and other similar activities or auxiliary en-

terprises. Also included under this definition is any other category of cost treated as "unallowable," provided such category of cost identifies a function or activity to which a portion of the institution's indirect costs (as defined in section E.1.) are properly allocable.

5. *Apportionment* means the process by which the indirect costs of the institution are assigned as between (a) instruction and research, and (b) other institutional activities.

6. *Allocation* means the process by which the indirect costs apportioned to instruction and research are assigned as between (a) organized research, and (b) instruction, including departmental research.

7. *Stipulated salary support* is a fixed or a stated dollar amount of the salary of professorial or other professional staff involved in the conduct of research which a Government agency agrees in advance to reimburse an educational institution as a part of sponsored research costs.

8. *Federal agency* or sponsoring agency means the Department of Education.

C. BASIC CONSIDERATIONS

1. *Composition of total costs.* The cost of a research agreement is comprised of the allowable direct costs incident to its performance, plus the allocable portion of the allowable indirect costs of the institution, less applicable credits as described in section C.5.

2. *Factors affecting allowability of costs.* The tests of allowability of costs under these principles are:

(a) They must be reasonable;

(b) They must be allocable to research agreements under the standards and methods provided herein;

(c) They must be accorded consistent treatment through application of those generally accepted accounting principles appropriate to the circumstances; and

(d) They must conform to any limitations or exclusions set forth in these principles or in the research agreement as to types or amounts of cost items.

3. *Reasonable costs.* A cost may be considered reasonable if the nature of the goods or services acquired or applied, and the amount involved therefor, reflect the action that a prudent person would have taken under the circumstances prevailing at the time the decision to incur the cost was made. Major considerations involved in the determination of the reasonableness of a cost are:

(a) Whether or not the cost is of a type generally recognized as necessary for the operation of the institution or the performance of the research agreement;

(b) The restraints or requirements imposed by such factors as arm's-length bargaining, Federal and State laws and regulations, and research agreement terms and conditions;

(c) Whether or not the individuals concerned acted with due prudence in the circumstances, considering their responsibilities to the institution, its employees, its students, the Government, and the public at large; and

(d) The extent to which the actions taken with respect to the incurrence of the cost are consistent with established institutional policies and practices applicable to the work of the institution generally, including Government research.

4. *Allocable costs.* a. A cost is allocable to a particular cost objective (i.e., a specific function, project, research agreement, department, or the like) if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a research agreement if it is incurred solely to advance the work under the research agreement; or it benefits both the research agreement and other work of the institution in proportions that can be approximated through use of reasonable methods; or it is necessary to the overall operation of the institution and, in the light of the standards provided in this appendix is deemed to be assignable in part to organized research. Where the purchase of equipment or other capital items is specifically authorized under a research agreement, the amounts thus authorized for such purchases are allocable to the research agreement regardless of the use that may subsequently be made of the equipment or other capital items involved.

b. Any costs allocable to a particular research agreement under the standards provided in this appendix may not be shifted to other research agreements in order to meet deficiencies caused by overruns or other fund considerations, to avoid restrictions imposed by law or by terms of the research agreement, or for other reasons of convenience.

5. *Applicable credits.* a. The term applicable credits refers to those receipt or negative expenditure types of transactions which operate to offset or reduce expense items that are allocable to research agreements as direct or indirect costs. Typical examples of such transactions are: purchase discounts, rebates, or allowances; recoveries or indemnities on losses; sales of scrap or incidental services; and adjustments of overpayments or erroneous charges.

b. In some instances, the amounts received from the Federal Government to finance institutional activities or service operations should be treated as applicable credits. Specifically, the concept of netting such credit items against related expenditures should be applied by the institution in determining the rates or amounts to be charged to Government research for services rendered whenever the facilities or other resources used in providing such services have been financed directly, in whole or in part, by Federal funds. (See sections F.6., J.10.b., and J.37. for areas of potential application in the matter of direct Federal financing.)

6. *Costs incurred by State and local governments.* Costs incurred or paid by State or local governments in behalf of educational institutions for certain personnel benefit programs such as pension plans, FICA, and any other costs specifically disbursed in behalf of and in direct benefit to the institutions, are allowable costs of such institutions whether or not these costs are recorded in the accounting records of such institutions, subject to the following:

a. Such costs meet the requirements of sections C.1. through C.5.

b. Such costs are properly supported by cost allocation plans in accordance with Appendix C to this part.

c. Such costs are not otherwise borne directly or indirectly by the Federal Government.

D. Direct Costs

1. *General.* Direct costs are those costs which can be identified specifically with a particular research project, an instructional activity or any other institutional activity or which can be directly assigned to such activities relatively easily with a high degree of accuracy.

2. *Application to research agreements.* Identifiable benefit to the research work rather than the nature of the goods and services involved is the determining factor in distinguishing direct from indirect costs of research agreements. Typical transactions chargeable to a research agreement as direct costs are the compensation of employees for performance of work under the research agreement, including related staff benefit and pension plan costs to the extent that such items are consistently treated by the educational institution as direct rather than indirect costs; the costs of materials consumed or expended in the performance of such work; and other items of expense incurred for the research agreement, including extraordinary utility consumption. The cost of materials supplied from stock or services rendered by specialized facilities or other institutional service operations may be included as direct costs of research agreements provided such items are consistently treated by the institution as direct rather than indirect costs and are charged under a recognized method of costing or pricing designed to recover only actual costs and conforming to generally accepted cost accounting practices consistently followed by the institution.

E. Indirect Costs

1. *General.* Indirect costs are those that have been incurred for common or joint objectives and therefore cannot be identified specifically with a particular research project, an instructional activity or any other institutional activity. At educational institutions such costs normally are classified under the following functional categories: general administration and general expenses; research administration expenses; operation and maintenance expenses; library expenses: and departmental administration expenses.

2. *Criteria for distribution—a. Base period.* A base period for distribution of indirect costs is the period during which such costs are incurred and accumulated for distribution to work performed within that period. The base period normally should coincide with the fiscal year established by the institution, but in any event the base period should be so selected as to avoid inequities in the distribution of costs.

b. *Need for cost groupings.* The overall objective of the allocation and apportionment process is to distribute the indirect costs described in section F to organized research, instruction, and other activities in reasonable proportions consistent with the nature and extent of the use of the institution's resources by research personnel, academic staff, students, and other personnel or organizations. In order to achieve this objective, it may be necessary to provide for selective distribution by establishing separate groupings of cost within one or more of the functional categories of indirect costs referred to in section E.1. In general, the cost groupings established within a functional category should constitute, in each case, a pool of those items of expense that are considered to be of like character in terms of their relative contribution to (or degree of remoteness from) the particular cost objectives to which distribution is appropriate. Cost groupings should be established considering the general guides provided in paragraph c. below. Each such pool or cost grouping should then be distributed individually to the appertaining cost objectives, using the distribution base or method most appropriate in the light of the guides set out in paragraph d. below.

c. *General considerations on cost groupings.* The extent to which separate cost groupings and selective distribution would be appropriate at an institution is a matter of judgment to be determined on a case-by-case basis. Typical situations which may warrant the establishment of two or more separate cost groups (based on account classification or analysis) within a functional category include but are not limited to the following:

(1) Where certain items or categories of expense relate solely to one of the three major divisions of the institution (instruction, organized research or other institutional activities) or to any two but not the third, such expenses should be set aside as a separate cost grouping for direct assignment or selective distribution in accordance with the guides provided in paragraph b. above and paragraph d. below.

(2) Where any types of expense ordinarily treated as general administration and general expenses or departmental administration expenses are charged to research agreements as direct costs, the similar type expenses applicable to other activities of the institution must, through separate cost groupings, be excluded from the indirect costs allocable to those research agreements and included in the direct cost of other activities for cost allocation purposes.

(3) Where it is determined that certain expenses are for the support of a service unit or facility whose output is susceptible of measurement on a workload or other quantitative basis, such expenses should be set aside as a separate cost grouping for distribution on such basis to organized research and other activities at the institution or within the department.

(4) Where organized activities (including identifiable segments of organized research as well as the activities cited in section B.4.) provide their own purchasing, personnel administration, building maintenance or similar service, the distribution of general administration and general expenses or operation and maintenance expenses to such activities should be accomplished through cost groupings which include only that portion of central indirect costs (such as for overall management) which are properly allocable to such activities.

(5) Where the institution elects to treat as indirect charges the cost of the pension plan and other staff benefits, such costs should be set aside as a separate cost grouping for selective distribution to appertaining cost objectives, including organized research.

(6) The number of separate cost groupings within a functional category should be held within practical limits, after taking into consideration the materiality of the amounts involved and the degree of precision attainable through less selective methods of distribution.

d. *Selection of distribution method.* (1) Actual conditions must be taken into account in selecting the method or base to be used in distributing to applicable cost objectives the expenses assembled under each of the individual cost groupings established as indicated under paragraph b. above. Where a distribution can be made by assignment of a cost grouping directly to the area benefited, the distribution should be made in that manner. Where the expenses under a cost grouping are more general in nature, the distribution to appertaining cost objectives should be made through use of a selected base which will produce results that are equitable to both the Government and the institution. In general, any cost element or cost-related factor associated with the institution's work is potentially adaptable for use as a distribution base provided (a) it can readily be expressed in terms of dollars or other quantitative measure (total direct expenditures, direct salaries, man-hours applied, square feet utilized, hours of usage, number of documents processed, population served, and the like); and (b) it is common to the appertaining cost objectives during the base period.

(2) Results of cost analysis studies may be used when they result in more accurate and equitable distribution of costs. Such cost analysis studies may take into consideration weighting factors, population, or space occupied if they produce equitable results. Cost analysis studies, however, should:

(a) Be appropriately documented in sufficient detail for subsequent review by the cognizant Federal agency,

(b) Distribute the indirect costs to the appertaining cost objectives in accord with the relative benefits derived,

(c) Be conducted to fairly reflect the true conditions of the activity and to cover representative transactions for a reasonable period of time,

(d) Be performed specifically at the institution at which the results are to be used, and

(e) Be updated periodically and used consistently. Any assumptions made in the study will be sufficiently supported. The use of cost analysis studies and periodic changes in the method of cost distribution must be fully justified.

(3) The essential consideration in selection of the distribution base in each instance is that it be the one best suited for assigning the pool of costs to appertaining cost objectives in accord with the relative benefits derived; the traceable cause and effect relationship; or logic and reason, where neither benefit nor cause and effect relationship is determinable.

3. *Administration of limitations on allowances for research costs.* Research agreements may be subject to statutory or administrative policies that limit the allowance of research costs. When the maximum amount allowable under a statutory limitation or the terms of a research agreement is less than the amount otherwise reimbursable under this Appendix, the amount not recoverable under that research agreement may not be charged to other research agreements.

F. IDENTIFICATION AND ASSIGNMENT OF INDIRECT COSTS

. *General administration and general ex- nses.* a. The expenses under this heading e those that have been incurred for the neral executive and administrative offices educational institutions and other ex- nses of a general character which do not iate solely to any major division of the in- tution; i.e., solely to (1) instruction, (2) or- nized research, or (3) other institutional tivities. The general administration and neral expense category should also in- ude the staff benefit and pension plan sts applicable to the salaries and wages in- uded therein, an appropriate share of the sts of the operation and maintenance of e physical plant, and charges representing e allowances and/or depreciation applica- e to the buildings and equipment utilized performing the functions represented ereunder.

b. The expenses included in this category ay be apportioned and allocated on the sis of total expenditures exclusive of cap- al expenditures in situations where the re- lts of the distribution made on this basis e deemed to be equitable both to the Gov- nment and the institution; otherwise the stribution of general administration and eneral expenses should be made through e of selected bases applied to separate st groupings established within this cate- ory of expenses in accordance with the uides set out in section E.2.d.

2. *Research administration expenses.* a. he expenses under this heading are those at have been incurred by a separate orga- ization or identifiable administrative unit stablished solely to administer the re- earch activity, including such functions as ontract administration, security, purchas- g, personnel administration, and editing nd publishing of research reports. They in- lude the salaries and expenses of the head f such research organization, his assistants, nd their immediate secretarial staff togeth- r with the salaries and expenses of person- el engaged in supporting activities main- ained by the research organization, such as tock rooms, stenographic pools, and the ike. The salaries of members of the profes- ional staff whose appointments or assign- nents involve the performance of such ad- ninistrative work may also be included to he extent that the portion so charged to re- earch administration is supported as re- uired by section J.7. The research adminis- ration expense category should also include he staff benefit and pension plan costs ap- plicable to the salaries and wages included herein, an appropriate share of the costs of he operation and maintenance of the phys- cal plant, and charges representing use al- owance and/or depreciation applicable to he buildings and equipment utilized in performing the functions represented thereunder.

b. The expenses included in this category should be allocated to organized research and, where necessary, to departmental research or to any other benefiting activities on any basis reflecting the proportion fairly applicable to each. (See section E.2.d.)

3. *Operation and maintenance expenses.* a. The expenses under this heading are those that have been incurred by a central service organization or at the departmental level for the administration, supervision, operation, maintenance, preservation, and protection of the institution's physical plant.

They include expenses normally incurred for such items as janitorial and utility services; repairs and ordinary or normal alterations of buildings, furniture and equipment; and care of grounds and maintenance and operation of buildings and other plant facilities. The operation and maintenance expense category should also include the staff benefit and pension plan costs applicable to the salaries and wages included therein, and charges representing use allowance and/or depreciation applicable to the buildings and equipment utilized in performing the functions represented thereunder.

b. The expenses included in this category should be apportioned and allocated to applicable cost objectives in a manner consistent with the guides provided in section E.2. on a basis that gives primary emphasis to space utilization. The allocations and apportionments should be developed as follows:

(1) Where actual space and related cost records are available or can readily be developed and maintained without significant change in the accounting practices, the amount distributed should be based on such records;

(2) Where the space and related cost records maintained are not sufficient for purposes of the foregoing, a reasonable estimate of the proportion of total space assigned to the various cost objectives normally will suffice as a means for effecting distribution of the amounts of operation and maintenance expenses involved; or

(3) Where it can be demonstrated that an area or volume of space basis of allocation is impractical or inequitable, other bases may be used provided consideration is given to the use of facilities by research personnel and others, including students.

4. *Library expenses.* a. The expenses under this heading are those that have been incurred for the operation of the library, including the costs of books and library materials purchased for the library, less any items of library income that qualify as applicable credits under section C.5. The library expense category should also include the staff benefit and pension plan costs ap-

plicable to the salaries and wages included therein, an appropriate share of the costs of the operation and maintenance of the physical plant, and charges representing the allowances and/or depreciation applicable to the buildings and equipment utilized in the performance of the functions represented thereunder. Costs incurred in the purchases of rare books (museum-type books) with no research value should not be allocated to Government-sponsored research.

b. The expenses included in this category should be allocated on the basis of population including students and other users. Where the results of the distribution made on this basis are deemed to be inequitable to the Government or the institution, the distribution should then be made on a selective basis in accordance with the guides set out in section E.2. Such selective distribution should be made through use of reasonable methods which give adequate recognition to the utilization of the library attributable to faculty, research personnel, students and others. The method used will be based on data developed periodically on the respective institution's experience for representative periods.

5. *Departmental administration expenses.* a. The expenses under this heading are those that have been incurred in academic deans' offices, academic departments and organized research units such as institutes, study centers and research centers for administrative and supporting services which benefit common or joint departmental activities or objectives. They include the salaries, and expenses of deans or heads, or associate deans or heads, of colleges, schools, departments, divisions, or organized research units, and their administrative staffs together with the salaries and expenses of personnel engaged in supporting activities maintained by the department, such as stockrooms, stenographic pools, and the like, provided such supporting services cannot be directly identified with a specific research project, with an instructional activity or with any other institutional activity. The salaries of other members of the professional staff whose appointments or assignments involve the performance of such administrative work may also be included to the extent that the portion so charged to departmental administration expenses is supported as required by section J.7. The departmental administration expense category should also include the staff benefit and pension plan costs applicable to the salaries and wages included therein, an appropriate share of the costs of the operation and maintenance of the physical plant, and charges representing use allowances and/or depreciation applicable to the buildings and equipment utilized in performing the functions represented thereunder.

b. The distribution of departmental administration expenses should be made through use of selected bases applied to cost groupings established within this category of expenses in accordance with the guides set out in section E.2.d.

6. *Setoff for indirect expenses otherwise provided for by the Government.* a. The items to be accumulated under this heading are the reimbursements and other receipts from the Federal Government which are used by the institution to support directly, in whole or in part, any of the administrative or service (indirect) activities described in the foregoing (sections F.1. through F.5.). They include any amounts thus applied to such activities which may have been received pursuant to an institutional base grant or any similar contractual arrangement with the Federal Government other than a research agreement as herein defined (section B.3).

b. The sum of the items in this group shall be treated as a credit to the total indirect cost pool before it is apportioned to organized research and to other activities. Such setoff shall be made prior to the determination of the indirect cost rate or rates as provided in section G.

G. DETERMINATION AND APPLICATION OF INDIRECT COST RATE OR RATES

1. *Indirect cost pools.* a. Subject to b below, indirect costs allocated to organized research should be treated as a common pool, and the costs in such common pool should then be distributed to individual research agreements benefiting therefrom on a single rate basis.

b. In some instances a single rate basis for use across the board on all Government research at an institution may not be appropriate, since it would not take into account those different environmental factors which may affect substantially the indirect costs applicable to a particular segment of Government research at the institution. For this purpose, a particular segment of Government research may be that performed under a single research agreement or it may consist of research under a group of research agreements performed in a common environment. The environmental factors are not limited to the physical location of the work. Other important factors are the level of the administrative support required, the nature of the facilities or other resources employed, the scientific disciplines or technical skills involved, the organizational arrangements used, or any combination thereof. Where a particular segment of Government research is performed within an environment which appears to generate a significantly different level of indirect costs, provision should be made for a separate indirect cost pool applicable to such work.

The separate indirect cost pool should be developed during the course of the regular distribution process, and the separate indirect cost rate resulting therefrom should be utilized provided it is determined that (1) such indirect cost rate differs significantly from that which would have obtained under paragraph a. above, and (2) the volume of research work to which such rate would apply is material in relation to other Government research at the institution.

2. *The distribution base.* Indirect costs allocated to organized research should be distributed to applicable research agreements on the basis of direct salaries and wages. For this purpose, an indirect cost rate should be determined for each of the separate indirect cost pools developed pursuant to section G.1. The rate in each case should be stated as the percentage which the amount of the particular indirect cost pool is of the total direct salaries and wages of all research agreements identified with such pool. For the purpose of establishing an indirect cost rate, direct salaries and wages may include that portion contributed to the research by the institution for cost sharing or other purposes. Bases other than salaries and wages may be used provided it can be demonstrated that they produce more equitable results.

3. *Negotiated lump sum for indirect costs.* A negotiated fixed amount in lieu of indirect costs may be appropriate for self-contained, off-campus, or primarily subcontracted research activities where the benefits derived from an institution's indirect services cannot be readily determined. Such amount negotiated in lieu of indirect costs will be treated as an offset to total indirect expenses before apportionment to instruction, organized research, and other institutional activities. The base on which such remaining expenses are allocated should be approximately adjusted.

4. *Predetermined fixed rates for indirect costs.* Public Law 87-638 (76 Stat. 437) authorizes the use of predetermined fixed rates in determining the indirect costs applicable under research agreements with educational institutions. The stated objectives of the law are to simplify the administration of cost-type research and development contracts (including grants) with educational institutions, to facilitate the preparation of their budgets, and to permit more expeditious closeout of such contracts when the work is completed. In view of the potential advantages offered by this procedure, consideration should be given to the negotiation of predetermined fixed rates for indirect costs in those situations where the cost experience and other pertinent facts available are deemed sufficient to enable the parties involved to reach an informed judgment as to the probable level of indirect costs during the ensuing accounting period.

5. *Negotiated fixed rates and carryforward provisions.* When a fixed rate is negotiated in advance for a fiscal year (or other time period), the over- or under-recovery for that year may be included as an adjustment to the indirect cost for the next rate negotiation. When the rate is negotiated before the carryforward adjustment is determined due to the delay in audit, the carryforward may be applied to the next subsequent rate negotiation. When such adjustments are to be made, each fixed rate negotiated in advance for a given period will be computed by applying the expected indirect costs allocable to Government research for the forecast period plus or minus the carryforward adjustment (over- or under-recovery) from the prior period, to the forecast distribution base. Unrecovered amounts under lump-sum agreements or cost-sharing provisions of prior years shall not be carried forward for consideration in the new rate negotiation. There must, however, be an advance understanding in each case between the institution and the cognizant Federal agency as to whether these differences will be considered in the rate negotiation rather than making the determination after the differences are known. Further, institutions electing to use this carryforward provision may not subsequently change without prior approval of the cognizant Federal agency. In the event that an institution returns to a postdetermined rate, any over- or under-recovery during the period in which negotiated fixed rates and carryforward provisions were followed will be included in the subsequent postdetermined rates. Where multiple rates are used, the same procedure will be applicable for determining each rate. This procedure also applies to rates established for grants and contracts for training and other educational services, but does not apply to cost-type research agreements covering work performed in wholly or partially Government-owned facilities.

H. SIMPLIFIED METHOD FOR SMALL INSTITUTIONS

1. *General.* a. Where the total direct cost of all federally supported work under research and educational service agreements at an institution does not exceed $1 million in a fiscal year (excluding direct payments by the institution to participants under educational service agreements for stipends, support, and similar costs requiring little, if any, indirect cost support), the use of the abbreviated procedure described in paragraph 2., below, may be used in determining allowable indirect costs. Under this abbreviated procedure, the institution's most recent annual financial report and immediately available supporting information, with salaries and wages segregated from other costs, will be utilized as a basis for determining

the indirect cost rate applicable both to federally supported research and educational service agreements.

b. The rigid formula approach provided under this abbreviated procedure should not be used where it produces results which appear inequitable to the Government or the institution. In any such case, indirect costs should be determined through use of the regular procedure.

2. *Abbreviated procedure.* a. Establish the total amount of salaries and wages paid to all employees of the institution.

b. Establish an indirect cost pool consisting of the expenditures (exclusive of capital items and other costs specifically identified as unallowable) which customarily are classified under the following titles or their equivalents:

(1) General administration and general expenses (exclusive of costs of student administration and services, student aid, student activities, and scholarships).

(2) Operation and maintenance of physical plant.

(3) Library.

(4) Department administration expenses, which will be computed as 20 percent of the salaries and expenses of deans and heads of departments.

In those cases where expenditures classified under paragraphs 2.b.(1) and 2.b.(2) have previously been allocated to other institutional activities, they may be included in the indirect cost pool. The total amount of salaries and wages included in the indirect cost pool must be separately identified.

c. Establish a salary and wage distribution base, determined by deducting from the total of salaries and wages as established under paragraph 2.a. the amount of salaries and wages included under paragraph 2.b.

d. Establish the indirect cost rate, determined by dividing the amount in the indirect cost pool paragraph 2.b. by the amount of the distribution base paragraph 2.c.

e. Apply the indirect cost rate established to direct salaries and wages for individual agreements to determine the amount of indirect costs allocable to such agreements.

I. [RESERVED]

J. GENERAL STANDARDS FOR SELECTED ITEMS OF COST

Sections J.1. through J.46. provide standards to be applied in establishing the allowability of certain items involved in determining cost. These standards should apply irrespective of whether a particular item of cost is properly treated as direct cost or indirect cost. Failure to mention a particular item of cost in the standards is not intended to imply that it is either allowable or unallowable; rather determination as to allowability in each case should be based on the treatment or standards provided for similar or related items of cost. In case of discrepancy between the provisions of a specific research agreement and the applicable standards provided, the provisions of the research agreement should govern.

1. *Advertising costs.* The term advertising costs means the costs of advertising media and corollary administrative costs. Advertising media include magazines, newspapers, radio and television programs, direct mail, exhibits, and the like. The only advertising costs allowable are those which are solely for:

(a) The recruitment of personnel required for the performance by the institution of obligations arising under the research agreement, when considered in conjunction with all other recruitment costs, as set forth in section J.32;

(b) The procurement of scarce items for the performance of the research agreement; or

(c) The disposal of scrap or surplus materials acquired in the performance of the research agreement. Costs of this nature, if incurred for more than one research agreement or for both research agreement work and other work of the institution, are allowable to the extent that the principles in sections D and E are observed.

2. *Bad debts.* Any losses, whether actual or estimated arising from uncollectible accounts and other claims, related collections costs, and related legal costs, are unallowable.

3. *Capital expenditures.* The costs of equipment, buildings, and repairs which materially increase the value or useful life of buildings or equipment, are unallowable except as provided for in the research agreement. Government funds shall not be used for the acquisition of land, or any interest therein, except with the specific prior approval of the sponsoring agency.

4. *Civil defense costs.* Civil defense costs are those incurred in planning for, and the protection of life and property against, the possible effects of enemy attack. Reasonable costs of civil defense measures (including costs in excess of normal plant protection costs, first-aid training and supplies, firefighting training, posting of additional exit notices and directions, and other approved civil defense measures) undertaken on the institution's premises pursuant to suggestions or requirements of civil defense authorities are allowable when distributed to all activities of the institution. Capital expenditures for civil defense purposes will not be allowed, but a use allowance or depreciation may be permitted in accordance with provisions set forth in section J.10. Costs of local civil defense projects not on the institution's premises are unallowable.

5. *Commencement and convocation costs.* Costs incurred for commencements and con-

vocations apply only to instruction and therefore are not allocable to research agreements, either as direct costs or indirect costs.

6. *Communication costs.* Costs incurred for telephone services, local and long-distance telephone calls, telegrams, radiograms, postage and the like, are allowable.

7. *Compensation for personal services*—a. *General.* Compensation for personal services covers all remuneration paid currently or accured to the institution for services of employees rendered during the period of performance under Government research agreements. Such remuneration includes salaries, wages, staff benefits (see section J.39.), and pension plan costs (see section J.23.). The costs of such remuneration are allowable to the extent that the total compensation to individual employees is reasonable for the services rendered and conforms to the established policy of the institution consistently applied, and provided that the charges for work performed directly on Government research agreements and for other work allocable as indirect costs to organized research are determined and supported as hereinafter provided.

b. *Payroll distribution.* Amounts charged to organized research for personal services, except stipulated salary support, regardless of whether treated as direct costs or allocated as indirect costs, will be based on institutional payrolls which have been approved and documented in accordance with generally accepted institutional practices. Support for direct and indirect allocations of personal service costs to (1) instruction, (2) organized research, and (3) indirect activities as defined in section E.1., or (4) other institutional activities as defined in section B.4., will be provided as described in paragraphs c., d., e., and f., below.

c. *Stipulated salary support.* As an alternative to payroll distribution, stipulated salary support amounts may be provided in the research agreement for professorial staff, any part of whose compensation is chargeable to Government-sponsored research. Stipulated salary support may also be provided for any other professionals who are engaged part time in sponsored research and part time in other work. The stipulated salary support for an individual will be determined by the Government and the educational institution during the proposal and award process on the basis of considered judgment as to the monetary value of the contribution which the individual is expected to make to the research project. This judgment will take into account any cost sharing by the institution and such other factors as the extent of the investigator's planned participation in the project and his ability to perform as planned in the light of his other commitments. It will be necessary for those who review research proposals to obtain information on the total academic year salary of the faculty members involved; the other research projects or proposals for which salary is allocated; and any other duties they may have such as teaching assignments, administrative assignments, number of graduate students for which they are responsible, or other institutional activities. Stipulated amounts for an individual must not per se result in increasing his official salary from the institution.

d. *Direct charges for personal services under payroll distribution.* The direct cost charged to organized research for the personal services of professorial and professional staff, exclusive of those whose salaries are stipulated in the research agreement, will be based on institutional payroll systems. Such institutional payroll systems must be supported by either:

(1) An adequate appointment and workload distribution system accompanied by monthly reviews performed by responsible officials and a reporting of any significant changes in workload distribution of each professor or professional staff member, or (2) a monthly after-the-fact certification system which will require the individual investigators, deans, departmental chairmen or supervisors having first-hand knowledge of the services performed on each research agreement to report the distribution of effort. Reported changes will be incorporated during the accounting period into the payroll distribution system and into the accounting records. Direct charges for salaries and wages of nonprofessionals will be supported by time and attendance and payroll distribution records.

e. *Direct charges for personal services under stipulated salaries.* The amounts stipulated for salary support will be treated as direct costs. The stipulated salary for the academic year will be prorated equally over the duration of the grant or contract period during the academic year, unless other arrangements have been made in the grant or contract instrument. No time or effort reporting will be required to support these amounts. Special provision for summer salaries, or for a particular "off period" if other than summer, will be required. The research agreements will state that any research covered by summer salary support must be carried out during the summer, not during the academic year, and at locations approved in advance in writing by the granting agency. The certification required in section K will attest to this requirement as well as all others in a given research agreement. Stipulated salary support remains fixed during the funding period of the grant or contract and will be costed at the rate described above unless there is a significant change in performance. For example, a significant change in performance would exist if the faculty member (1) was ill for an extended period, (2) took sabbatical leave to devote effort to duties unrelated to his research, or (3) was required to increase substantially his teaching assignments, administrative duties, or responsibility for more research projects. In the latter event, it will be the responsibility of the educational institution to reduce the charges to the research agreement proportionately or seek an appropriate amendment. In the case of those covered by stipulated salary support, the auditors are no longer required to review the precise accuracy of time or effort devoted to research projects. Rather, their reviews should include steps to determine on a sample basis that an institution is not reimbursed for more than 100 percent of each faculty member's salary and that the portion of each faculty member's salary charged to Government-sponsored research is reasonable in view of his university workload and other commitments. The stipulated salary method may also be agreed upon for that portion of a professional's salary that represents cost sharing by the institution.

f. *Indirect personal services costs.* Allowable indirect personal services costs will be supported by the educational institution's accounting system maintained in accordance with generally accepted institutional practices. Where a comprehensive accounting system does not exist, the institution should make periodic surveys no less frequently than annually to support the indirect personal services costs for inclusion in the overhead pool. Such supporting documentation must be retained for subsequent review by Government officials.

g. *General guidance for charging personal services.* Budget estimates on a monthly, quarterly, semester, or yearly basis do not qualify as support for charges to federally sponsored research projects and should not be used unless confirmed after the fact. Charges to research agreements may include reasonable amounts for activities contributing and intimately related to work under the agreement, such as preparing and delivering special lectures about specific aspects of the ongoing research, writing research reports and articles, participating in appropriate research seminars, consulting with colleagues and graduate students with respect to related research, and attending appropriate scientific meetings and conferences. In no case should charges be made to federally sponsored research projects for lecturing or preparing for formal courses listed in the catalog and offered for degree credit, or for committee or administrative work related to university business.

h. *Nonuniversity professional activities.* A university must not alter or waive university-wide policies and practices dealing with the permissible extent of professional services over and above those traditionally performed without extra university compensation, unless such arrangements are specifically authorized by the sponsoring agency. Where university-wide policies do not adequately define the permissible extent of consultantship or other nonuniversity activities undertaken for extra pay, the Government may require that the effort of professional staff working under research agreements be allocated as between (1) university activities, and (2) nonuniversity professional activities. If the sponsoring agency should consider the extent of nonuniversity professional effort excessive, appropriate arrangements governing compensation will be negotiated on a case-by-case basis.

i. *Salary rates for academic year.* Charges for work performed on Government research by faculty members during the academic year will be based on the individual faculty member's regular compensation for the continuous period which, under the practice of the institution concerned, constitutes the basis of his salary. Charges for work performed on research agreements during all or any portion of such period would be allowable at the base salary rate. In no event will the charge to research agreements, irrespective of the basis of computation, exceed the proportionate share of the base salary for that period, and any extra compensation above the base salary for work on Government research during such period would be unallowable. This principle applies to all members of the faculty at an institution. Since intrauniversity consulting is assumed to be undertaken as a university obligation requiring no compensation in addition to full-time base salary, the principle also applies to those who function as consultants or otherwise contribute to a research agreement conducted by another faculty member of the same institution. However, in unusual cases where consultation is across departmental lines or involves a separate or remote operation, and the work performed by the consultant is in addition to his regular departmental load, any charges for such work representing extra compensation above the base salary are allowable provided such consulting arrangement is specifically provided for in the research agreement or approved in writing by the sponsoring agency.

j. *Salary rates for periods outside the academic year.* Charges for work performed by faculty members on Government research during the summer months or other periods not included in the base salary period will be determined for each faculty member at a monthly rate not in excess of that which would be applicable under his base salary and will be limited to charges made in accordance with other paragraphs of J.7.

k. *Salary rates for part-time faculty.* Charges for work performed on Government research by a faculty member having only part-time appointment for teaching will be determined at a rate not in excess of that for which he is regularly paid for his part-time teaching assignments. Example: An institution pays $5,000 to a faculty member for half-time teaching during the academic year. He devoted one-half of his remaining time (25 percent of his total available time) to Government research. Thus his additional compensation, chargeable by the institution to Government research agreements, would be one-half of $5,000 or $2,500.

8. *Contingency provisions.* Contributions to a contingency reserve or any similar provision made for events the occurrence of which cannot be foretold with certainty as to time, intensity, or with an assurance of their happening, are unallowable.

9. *Deans of faculty and graduate schools.* The salaries and expenses of deans of faculty and graduate schools, or their equivalents, and their staffs, are allowable.

10. *Depreciation and use allowances.* a. Institutions may be compensated for the use of buildings, capital improvements, and usable equipment on hand through use allowances or depreciation. Use allowances are the means of providing such compensation when depreciation or other equivalent costs are not considered. However, a combination of the two methods may not be used in connection with a single class of fixed assets.

b. Due consideration will be given to Government-furnished facilities utilized by the institution when computing use allowances and/or depreciation if the Government-furnished facilities are material in amount. Computation of the use allowance and/or depreciation will exclude both the cost or any portion of the cost of buildings and equipment borne by or donated by the Federal Government, irrespective of where title was originally vested or where it presently resides and, secondly, the cost of grounds. Capital expenditures for land improvements (paved areas, fences, streets, sidewalks, utility conduits, and similar improvements not already included in the cost of buildings) are allowable provided the systematic amortization of such capital expenditures has been provided, based on reasonable determinations of the probable useful lives of the individual items involved, and the share allocated to organized research is developed from the amount thus amortized for the base period involved. Amortization methods once used should not be changed for a given building or equipment unless approved in advance by the cognizant Federal agency.

c. Where the use allowance method is followed, the use allowance for buildings and improvements will be computed at an annual rate not exceeding 2 percent of acquisition cost. The use allowance for equipment will be computed at an annual rate not exceeding 6⅔ percent of acquisition cost of usable and needed equipment in those cases where the institution maintains current records with respect to such equipment on hand. Where the institution's records reflect only the cost (actual or estimated) of the original complement of equipment, the use allowance will be computed at an annual rate not exceeding 10 percent of such cost. Original complement for this purpose means the complement of equipment initially placed in buildings to perform the functions currently being performed in such buildings; however, where a permanent change in the function of a building takes place, a redetermination of the original complement of equipment may be made at that time to establish a new original complement. In those cases where no equipment records are maintained, the institution will justify a reasonable estimate of the acquisition cost of usable and needed equipment which may be used to compute the use allowance at an annual rate not exceeding 6⅔ percent of such estimate.

d. Where the depreciation method is followed, adequate property record must be maintained and periodic inventory (a statistical sampling basis is acceptable) must be taken to insure that properties for which depreciation is charged do exist and are needed. The period of useful service (service life) established in each case for usable capital assets must be determined on a realistic basis which takes into consideration such factors as type of construction, nature of the equipment used, technological developments in the particular research area, and the renewal and replacement policies followed for the individual items or classes of assets involved. Where the depreciation method is introduced for application to assets acquired in prior years, the annual charges therefrom must not exceed the amounts that would have resulted had the depreciation method been in effect from the date of acquisition of such assets.

e. Where an institution elects to go to a depreciation basis for a particular class of assets, no depreciation, rental or use charge may be allowed on any such assets that, under paragraph d. above, would be viewed as fully depreciated provided, however, that reasonable use charges may be negotiated for any such assets if warranted after taking into consideration the cost of the facility or item involved, the estimated useful life remaining at time of negotiation, the actual replacement policy followed in the light of service lives used for calculating depreciation, the effect of any increased maintenance charges or decreased efficiency due to age, and any other factors pertinent to the utilization of the facility or item for the purpose contemplated.

11. *Employee morale, health, and welfare costs and credits.* The costs of house publications, health or first-aid clinics and/or infirmaries, recreational activities, employees' counseling services, and other expenses incurred in accordance with the institution's established practice or custom for the improvement of working conditions, employer-employee relations, employee morale, and employee-performance, are allowable. Such costs will be equitably apportioned to all activities of the institution. Income generated from any of these activities will be credited to the cost thereof unless such income has been irrevocably set over to employee welfare organizations.

12. *Entertainment costs.* Costs incurred for amusement, social activities, entertainment, and any items relating thereto, such as meals, lodging, rentals, transportation, and gratuities, are unallowable.

13. *Equipment and other facilities.* The costs of permanent equipment or other facilities are allowable where such purchases are approved by the sponsoring agency concerned or provided for by the terms of the research agreement. Total expenditures for permanent equipment may not exceed 125 percent of the amount allotted for the permanent equipment category by the sponsoring agency (through an approved budget or other document) except with approval. The term "permanent equipment" shall mean an item of property which has an acquisition cost of $200 or more and has an expected service life of one year or more.

a. *General purpose equipment.* Approval must be obtained to acquire with Government funds any general purpose permanent equipment, i.e., any items which are usable for activities of the institution other than research, such as office equipment and furnishings, air conditioning, reproduction, or printing equipment, motor vehicles, etc., or any automatic data processing equipment.

b. *Research equipment.* Approval must be obtained to acquire with Government funds any item of permanent research equipment costing $1,000 or more.

14. *Fines and penalties.* Costs resulting from violations of, or failure of the institution to comply with, Federal, State, and local laws and regulations are unallowable except when incurred as a result of compliance with specific provisions of the research agreement or instructions in writing from the contracting officer.

15. *Insurance and indemnification.* a. Costs of insurance required or approved, and maintained, pursuant to the research agreement, are allowable.

b. Costs of other insurance maintained by the institution in connection with the general conduct of its activities, are allowable subject to the following limitations:

(1) Types and extent and cost of coverage must be in accordance with sound institutional practice;

(2) Costs of insurance or of any contributions to any reserve covering the risk of loss of or damage to Government-owned property are unallowable except to the extent that the Government has specifically required or approved such costs; and

(3) Costs of insurance on the lives of officers or trustees are unallowable except where such insurance is part of an employee plan which is not unduly restricted.

c. Contributions to a reserve for an approved self-insurance program are allowable to the extent that the types of coverage, extent of coverage, and the rates and premiums would have been allowed had insurance been purchased to cover the risks.

d. Actual losses which could have been covered by permissible insurance (through an approved self-insurance program or otherwise) are unallowable unless expressly provided for in the research agreement, except that costs incurred because of losses not covered under existing deductible clauses for insurance coverage provided in keeping with sound management practice as well as minor losses not covered by insurance, such as spoilage, breakage, and disappearance of small hand tools, which occur in the ordinary course of operations, are allowable.

e. Indemnification includes securing the institution against liabilities to third persons and other losses not compensated by insurance or otherwise. The Government is obligated to indemnify the institution only to the extent expressly provided for in the research agreement, except as provided in d. above.

16. *Interest, fund raising, and investment management costs.* a. Costs incurred for interest on borrowed capital or temporary use of endowment funds, however represented, are unallowable.

b. Costs of organized fund raising, including financial campaigns, endowment drives, solicitation of gifts and bequests, and similar expenses incurred solely to raise capital or obtain contributions, are not allowable under Government research agreements.

c. Costs of investment counsel and staff and similar expenses incurred solely to enhance income from investments are not allowable under Government research agreements.

d. Costs related to the physical custody and control of monies and securities are allowable.

17. *Labor relations costs.* Costs incurred in maintaining satisfactory relations between the institution and its employees, including costs of labor management committees, employees' publications, and other related activities, are allowable.

3. *Losses on other research agreements or*
tracts. Any excess of costs over income
ler any other research agreement or con-
ct of any nature is unallowable. This in-
des, but is not limited to, the institution's
tributed portion by reason of cost-shar-
agreements or any under-recoveries
ough negotiation of flat amounts for in-
ect costs.

9. *Maintenance and repair costs.* Costs
urred for necessary maintenance, repair,
upkeep of property (including Govern-
nt property unless otherwise provided
) which neither add to the permanent
ue of the property nor appreciably pro-
g its intended life but keep it in an effi-
nt operating condition, are allowable.

0. *Material costs.* Costs incurred for pur-
sed materials, supplies, and fabricated
rts directly or indirectly related to the re-
rch agreement, are allowable. Purchases
de specifically for the research agree-
nt should be charged thereto at their
ual prices after deducting all cash dis-
unts, trade discounts, rebates, and allow-
ces received by the institution. Withdraw-
from general stores or stockrooms
ould be charged at their cost under any
cognized method of pricing stores' with-
awals conforming to sound accounting
actices consistently followed by the insti-
tion. Incoming transportation charges are
proper part of material cost. Direct mate-
l cost should include only the materials
d supplies actually used for the perform-
ce of the research agreement, and due
edit should be given for any excess materi-
s retained, or returned to vendors. Due
edit should be given for all proceeds or
lue received for any scrap resulting from
rk under the research agreement. Where
overnment-donated or furnished material
used in performing the research agree-
ent, such material will be used without
arge.

21. *Memberships, subscriptions, and pro-*
ssional activity costs. a. Costs of the insti-
tion's membership in civic, business, tech-
ical, and professional organizations are al-
wable.

b. Costs of the institution's subscriptions
civic, business, professional, and technical
eriodicals are allowable.

c. Costs of meetings and conferences,
hen the primary purpose is the dissemina-
on of technical information, are allowable.
his includes costs of meals, transportation,
ental of facilities, and other items inciden-
l to such meetings or conferences.

22. *Patent costs.* Cost of preparing disclo-
ures, reports, and other documents re-
uired by the research agreement and of
earching the art to the extent necessary tc
ake such invention disclosures, are allow-
ble. In accordance with the clauses of the
esearch agreement relating to patents,
osts of preparing documents and any other
patent costs, in connection with the filing of a patent application where title is conveyed to the Government, are allowable. (See also section J.33.)

23. *Pension plan costs.* Costs of the institution's pension plan which are incurred in accordance with the established policies of the institution are allowable, provided such policies meet the test of reasonableness and the methods of cost allocation are not discriminatory, and provided appropriate adjustments are made for credits or gains arising out of normal and abnormal employee turnover or any other contingencies that can result in forfeitures by employees which inure to the benefit of the institution.

24. *Plant security costs.* Necessary expenses incurred to comply with Government security requirements, including wages, uniforms, and equipment of personnel engaged in plant protection, are allowable.

25. *Preresearch agreement costs.* Costs incurred prior to the effective date of the research agreement, whether or not they would have been allowable thereunder if incurred after such date, are unallowable unless specifically set forth and identified in the research agreement.

26. *Professional services costs.* a. Costs of professional services rendered by the members of a particular profession who are not employees of the institution are allowable subject to paragraphs b. and c. below, when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government. Retainer fees to be allowable must be reasonably supported by evidence of services rendered.

b. Factors to be considered in determining the allowability of costs in a particular case include:

(1) The past pattern of such costs, particularly in the years prior to the award of Government research agreements;

(2) The impact of Government research agreements on the institution's total activity;

(3) The nature and scope of managerial services expected of the institution's own organizations; and

(4) Whether the proportion of Government work to the institution's total activity is such as to influence the institution in favor of incurring the cost, particularly where the services rendered are not of a continuing nature and have little relationship to work under Government research agreements.

c. Costs of legal, accounting, and consulting services, and related costs, incurred in connection with organization and reorganization or the prosecution of claims against the Government, are unallowable. Costs of legal, accounting and consulting services, and related costs, incurred in connection with patent infringement litigation, are unallowable unless otherwise provided for in the research agreement.

27. *Profits and losses on disposition of plant, equipment, or other capital assets.* Profits or losses of any nature arising from the sale or exchange of plant, equipment, or other capital assets, including sale or exchange of either short- or long-term investments, shall not be considered in computing research agreement costs.

28. *Proposal costs.* Proposal costs are the costs of preparing bids or proposals on potential Government and nongovernment research agreements or projects, including the development of engineering data and cost data necessary to support the institution's bids or proposals. Proposal costs of the current accounting period of both successful and unsuccessful bids and proposals normally should be treated as indirect costs and allocated currently to all activities of the institution, and no proposal costs of past accounting periods will be allocable in the current period to the Government research agreement. However, the institution's established practices may be to treat proposal costs by some other recognized method. Regardless of the method used, the results obtained may be accepted only if found to be reasonable and equitable.

29. *Public information services costs.* Costs of news releases pertaining to specific research or scientific accomplishment are unallowable unless specifically authorized by the sponsoring agency.

30. *Rearrangement and alteration costs.* Costs incurred for ordinary or normal rearrangement and alteration of facilities are allowable. Special arrangement and alteration costs incurred specifically for the project are allowable when such work has been approved in advance by the sponsoring agency concerned.

31. *Reconversion costs.* Costs incurred in the restoration or rehabilitation of the institution's facilities to approximately the same condition existing immediately prior to commencement of Government research agreement work, fair wear and tear excepted, are allowable.

32. *Recruiting costs.* a. Subject to paragraphs b., c., and d. below, and provided that the size of the staff recruited and maintained is in keeping with workload requirements, costs of "help wanted" advertising, operating costs of an employment office necessary to secure and maintain an adequate staff, costs of operating an aptitude and educational testing program, travel costs of employees while engaged in recruiting personnel, travel costs of applicants for interviews for prospective employment, and relocation costs incurred incident to recruitment of new employees, are allowable to the extent that such costs are incurred pursuant to a well-managed recruitment program. Where the institution uses employment agencies, costs not in excess of standard commercial rates for such services are allowable.

b. In publications, costs of help-wanted advertising that includes color, includes advertising material for other than recruitment purposes, or is excessive in size (taking into consideration recruitment purposes for which intended and normal institutional practices in this respect), are unallowable.

c. Costs of help-wanted advertising, special emoluments, fringe benefits, and salary allowances incurred to attract professional personnel from other institutions that do not meet the test of reasonableness or do not conform with the established practices of the institution, are unallowable.

d. Where relocation costs incurred incident to recruitment of a new employee have been allowed either as an allocable direct or indirect cost, and the newly hired employee resigns for reasons within his control within 12 months after hire, the institution will be required to refund or credit such relocation costs to the Government.

33. *Royalties and other costs for use of patents.* Royalties on a patent or amortization of the costs of acquiring a patent or invention or rights thereto, necessary for the proper performance of the research agreement and applicable to tasks or processes thereunder, are allowable unless the Government has a license or the right to free use of the patent, the patent has been adjudicated to be invalid or has been administratively determined to be invalid, the patent is considered to be unenforceable, or the patent has expired.

34. *Sabbatical leave costs.* Costs of leave of absence to employees for performance of graduate work or sabbatical study, travel, or research, are allowable provided the institution has a uniform policy on sabbatical leave for persons engaged in instruction and persons engaged in research. Such costs will be allocated on an equitable basis among all appertaining activities of the institution. Where sabbatical leave is included in fringe benefits for which a cost is determined for assessment as a direct charge, the aggregate amount of such assessments applicable to all work of the institution during the base period must be reasonable in relation to the institution's actual experience under its sabbatical leave policy.

35. *Scholarships and student aid costs.* Costs of scholarships, fellowships and other forms of student aid apply only to instruction and therefore are not allocable to research agreements, either as direct costs or indirect costs. However, in the case of students actually engaged in work under research agreements, any tuition remission to such students for work performed are allocable to such research agreements provid

ed consistent treatment is accorded such costs. (See section J.39.)

36. *Severance pay.* a. Severance pay is compensation in addition to regular salaries and wages which is paid by an institution to employees whose services are being terminated. Costs of severance pay are allowable only to the extent that such payments are required by law, by employer-employee agreement, by established policy that constitutes in effect an implied agreement on the institution's part, or by circumstances of the particular employment.

b. Severance payments that are due to normal, recurring turnover and which otherwise meet the conditions of paragraph a. above may be allowed provided the actual costs of such severance payments are regarded as expenses applicable to the current fiscal year and are equitably distributed among the institution's activities during that period.

c. Severance payments that are due to abnormal or mass terminations are of such conjectural nature that allowability must be determined on a case-by-case basis. However, the Government recognizes its obligation to participate, to the extent of its fair share, in any specific payment.

37. *Specialized service facilities operated by institution.* a. The costs, including amortization by generally accepted accounting practice, of institutional services involving the use of highly complex and specialized facilities such as electronic computers, including the cost of adapting computers for use, wind tunnels, and reactors are allowable provided the charges therefor meet the conditions of paragraph b. or c. below, and otherwise take into account any items of income or Federal financing that qualify as applicable credits under section C.5.

b. The costs of such institutional services normally will be charged directly to applicable research agreements based on actual usage or occupancy of the facilities on the basis of a schedule of rates that (1) is designed to recover only aggregate costs of providing such services over a long term agreed upon in advance by the cognizant Federal agency on an individual basis, and (2) is applied on a nondiscriminatory basis as between organized research and other work of the institution, including usage by the institution for internal purposes. Commercial or accommodation sales of computer services will be charged at not less than the above rates; however, if the rates charged for these services are greater, the total amount of charges above the scheduled rates when significant may be considered in revising the schedule of rates. Further, within the constraints of this paragraph, it is not necessary that the rates charged for services be equal to the cost of providing those services during any one fiscal year.

c. In the absence of an acceptable arrangement for direct costing as provided in b. above, the costs incurred for such institutional services may be assigned to research agreements as indirect costs, provided the methods used achieve substantially the same results. Such arrangements should be worked out in coordination with the cognizant Federal agency in order to assure equitable distribution of the indirect costs.

38. *Special services costs.* Costs incurred for general public relations activities, catalogs, alumni activities, and similar services, are unallowable.

39. *Staff benefits.* a. Staff benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as for annual leave, sick leave, military leave, and the like, are allowable provided such costs are absorbed by all institutional activities, including organized research, in proportion to the relative amount of time or effort actually devoted to each. (See section J.34. for treatment of sabbatical leave.)

b. Staff benefits in the form of employer contributions or expenses for social security, employee insurance, workmen's compensation insurance, the pension plan (see section J.23.), tuition or remission of tuition for individual employees or their families (see section J.35.), and the like, are allowable provided such benefits are granted in accordance with established institutional policies, and provided such contributions and other expenses, whether treated as indirect costs or as an increment of direct labor costs, are distributed to particular research agreements and other activities in a manner consistent with the pattern of benefits accruing to the individuals or groups of employees whose salaries and wages are chargeable to such research agreements and other activities.

40. *Student activity costs.* Costs incurred for intramural activities, student publications, student clubs, and other student activities, apply only to instruction and therefore are not allocable to research agreements, either as direct costs or indirect costs.

41. *Student services costs.* Costs of the deans of students, administration of student affairs, registrar, placement offices, student advisers, student health and infirmary services, and such other activities as are identifiable with student services apply only to instruction and therefore are not allocable to research agreements, either as direct costs or indirect costs. However, in the case of students actually engaged in work under research agreements, a proportion of student services costs measured by the relationship between hours of work by students on such research work and total student hours in-

cluding all research time may be allowed as a part of research administration expenses.

42. *Taxes.* a. In general, taxes which the institution is required to pay and which are paid or accrued in accordance with generally accepted accounting principles, and payments made to local governments in lieu of taxes which are commensurate with the local government services received are allowable, except for:

(1) Taxes from which exemptions are available to the institution directly or which are available to the institution based on an exemption afforded the Government and in the latter case when the sponsoring agency makes available the necessary exemption certificates, and

(2) Special assessments on land which represent capital improvements.

b. Any refund of taxes, interest, or penalties, and any payment to the institution of interest thereon, attributable to taxes, interest, or penalties which were allowed as research agreement costs, will be credited or paid to the Government in the manner directed by the Government provided any interest actually paid or credited to an institution incident to a refund of tax, interest and penalty will be paid or credited to the Government only to the extent that such interest accrued over the period during which the institution had been reimbursed by the Government for the taxes, interest, and penalties.

43. *Transportation costs.* Costs incurred for freight, express, cartage, postage, and other transportation services relating either to goods purchased, in process, or delivered, are allowable. When such costs can readily be identified with the items involved, they may be charged directly as transportation costs or added to the cost of such items. Where identification with the materials received cannot readily be made, inbound transportation costs may be charged to the appropriate indirect cost accounts if the institution follows a consistent, equitable procedure in this respect. Outbound freight, if reimbursable under the terms of the research agreement, should be treated as a direct cost.

44. *Travel costs.* a. Travel costs are the expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business of the institution. Such costs may be charged on an actual basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip and not to selected days of the trip, and results in charges consistent with those normally allowed by the institution in its regular operations.

b. Travel costs are allowable subject to paragraphs c., d., e., and f. below, when they are directly attributable to specific work under a research agreement or are incurred in the normal course of administration of the institution or a department or research program thereof.

c. The difference in cost between first-class air accommodations and less than first-class air accommodations is unallowable except when less than first-class air accommodations are not reasonably available to meet necessary mission requirements, such as where less than first-class accommodations would:

(1) Require circuitous routing,

(2) Require travel during unreasonable hours,

(3) Greatly increase the duration of the flight,

(4) Result in additional costs which would offset the transportation savings, or

(5) Offer accommodations which are not reasonably adequate for the medical needs of the traveler.

d. Costs of personnel movements of a special or mass nature are allowable only when authorized or approved in writing by the sponsoring agency or its authorized representative.

e. Foreign travel costs are allowable only when the travel has received specific prior approval. Each separate foreign trip must be specifically approved. For purposes of this provision, foreign travel is defined as "any travel outside of Canada and the United States and its territories and possessions."

f. Expenditures for domestic travel may not exceed $500, or 125 percent of the amount allotted for such travel by the sponsoring agency, whichever is greater, except with approval.

45. *Termination costs applicable to research agreements.* a. Termination of research agreements generally gives rise to the incurrence of costs or to the need for special treatment of costs, which would not have arisen had the agreement not been terminated. Items peculiar to termination are set forth below. They are to be used in conjunction with all other provisions of this Appendix in the case of termination.

b. The cost of common items of material reasonably usable on the institution's other work will not be allowable unless the institution submits evidence that it could not retain such items at cost without sustaining a loss. In deciding whether such items are reasonably usable on other work of the institution, consideration should be given to the institution's plans and orders for current and scheduled work. Contemporaneous purchases of common items by the institution will be regarded as evidence that such items are reasonably usable on the institution's other work. Any acceptance of common items as allowable to the terminated portion of the agreement should be limit-

the extent that the quantities of such
s on hand, in transit, and on order are
cess of the reasonable quantitative re-
ements of other work.

f in a particular case, despite all rea-
ble efforts by the institution, certain
cannot be discontinued immediately
the effective date of termination, such
are generally allowable within the lim-
ons set forth in this appendix, except
any such costs continuing after termi-
n due to the negligent or willful failure
e institution to discontinue such costs
e considered unacceptable.

Loss of useful value of special tooling
special machinery and equipment is
rally allowable, provided:

Such special tooling, machinery, or
ment is not reasonably capable of use
e other work of the institution;

The interest of the Government is pro-
d by transfer of title or by other means
ed appropriate by the contracting offi-
r equivalent; and

The loss of useful value as to any one
inated agreement is limited to that por-
of the acquisition cost which bears the
ratio to the total acquisition cost as
terminated portion of the agreement
s to the entire terminated agreement
other Government agreements for
h the special tooling, special machin-
r equipment was acquired.

Rental costs under unexpired leases are
rally allowable where clearly shown to
been reasonably necessary for the per-
ance of the terminated agreement, less
esidual value of such leases, if:

The amount of such rental claimed
not exceed the reasonable use value of
property leased for the period of the
ement and such further period as may
asonable; and

The institution makes all reasonable
ts to terminate, assign, settle, or other-
reduce the cost of such lease. There
may be included the cost of alterations
ch leased property, provided such alter-
s were necessary for the performance
e agreement, and of reasonable restora-
required by the provisions of the lease.

Settlement expenses including the fol-
g are generally allowable:

Accounting, legal, clerical, and similar
reasonably necessary for the prepara-
and presentation to contracting officers
uivalent of settlement claims and sup-
ng data with respect to the terminated
on of the agreement, and the termina-
and settlement of subagreements; and

reasonable costs for the storage, trans-
ation, protection, and disposition of
erty provided by the Government or ac-
d or produced by the institution for
greement.

Claims under subagreements, including
allocable portion of claims which are
common to the agreement and to other work of the institution, are generally allowable.

K. CERTIFICATION OF CHARGES

To assure that expenditures for research grants and contracts are proper and in accordance with the research agreement documents and approved project budgets, the annual and/or final fiscal reports or vouchers requesting payment under research agreements will include a certification, signed by an authorized official of the university, which reads essentially as follows: "I certify that all expenditures reported (or payments requested) are for appropriate purposes and in accordance with the agreements set forth in the application and award documents."

APPENDIX D—PART II—PRINCIPLES FOR DETERMINING COSTS APPLICABLE TO TRAINING AND OTHER EDUCATIONAL SERVICES UNDER GRANTS AND CONTRACTS WITH EDUCATIONAL INSTITUTIONS

A. *Purpose.* This part extends the scope of Part I to cover the determination of costs incurred by educational institutions under Federal grants and contracts for training and other educational services.

B. *Application.* The Department of Education will use Parts I and II of this Appendix as a basis for determining allowable costs under grants and cost reimbursement type contracts with educational institutions for work performed under federally supported education service agreements.

C. *Terminology.* The following definitions are to be used in determining the indirect cost of federally sponsored training and other educational services under this Part II:

1. *Educational service agreement* means any grant or contract under which Federal financing is provided on a cost reimbursement basis for all or an agreed portion of the costs incurred for training or other educational services. Typical of the work covered by educational service agreements are summer institutes, special training programs for selected participants, professional or technical services to cooperating countries, the development and introduction of new or expanded courses, and similar instructional oriented undertakings, including special research training programs, that are separately budgeted and accounted for by the institution.

The term does not extend to:

(a) Grants or contracts for organized research,

(b) Arrangements under which the Federal financing is exclusively in the form of scholarships, fellowships, traineeships, or other fixed amounts such as a cost of education allowance or the normal published tuition rates and fees of an institution, or

(c) Construction, facility and exclusively general resource or institutional-type grants.

2. *Instruction* means all of the academic work other than organized research carried on by an institution, including the teaching of graduate and undergraduate courses, departmental research (see section B.2. of Part I) and all special training or other instructional-oriented projects sponsored by the Federal Government or others under educational service agreements.

D. *Student administration and services.* In addition to the five major functional categories of indirect costs described in section F of Part I, there is established an additional category under the title "Student administration and services" to embrace the following:

1. The expenses in this category are those that have been incurred for the administration of student affairs and for services to students, including expenses of such activities as deans of students, admissions, registrar, counseling and placement services, student advisers, student health and infirmary services, catalogs, and commencements and convocations. The salaries of members of the academic staff whose academic appointments or assignments involve the performance of such administrative or service work may also be included to the extent that the portion so charged is supported pursuant to section J.2. of Part I. The student administration and services category also includes the staff benefit and pension plan costs applicable to the salaries and wages included therein, an appropriate share of the cost of the operation and maintenance of the physical plant, and charges representing use allowance or depreciation applicable to the buildings and equipment utilized in the performance of the functions included in this category.

2. The expenses in this category are generally applicable in their entirety to the instruction activity. They should be allocated to applicable cost objectives within the instruction activity, including educational service agreements, when such agreements reasonably benefit from these expenses. Such expenses should be allocated on the basis of population served (computed on the basis of full-time equivalents including students, faculty, and others as appropriate) or other methods which will result in an equitable distribution to cost objectives in relation to the benefits received and be consistent with guides provided in section E.2. of Part I.

E. *Direct costs of educational service agreements.* Direct costs of work performed under educational service agreements will be determined consistent with the principles set forth in section D of Part I.

F. *Indirect costs of the instruction activity.* The indirect costs of the instruction activity as a whole should include its allocated share of administrative and supportive costs determined in accordance with the principles set forth in section D above and in section F of Part I. Such costs may include other items of indirect cost incurred solely for the instruction activity and not included in the general allocation of the various categories of indirect expenses. Costs incurred for the institutions by State and local governments are allowable as provided for in section C.6. of Part I.

G. *Indirect costs applicable to educational service agreements.* The individual items of indirect costs applicable to the instruction activity as a whole should be assigned to:

(1) Educational service agreements, and

(2) All other instructional work through use of appropriate cost groupings, selected distribution bases, and other reasonable methods as outlined in section E.2. of Part I. A single indirect pool may be used for all educational service agreements provided this results in a reasonably equitable distribution of costs among agreements in relation to indirect support services provided. However, when the level of indirect support significantly varies for work performed either on campus or off campus under a particular agreement or group of agreements, separate cost pools should be established consistent with the principles set forth in section G.1.b. of Part I. Where direct charges are provided for under educational service agreements for such things as commencement fees, student fees, and tuition, the related indirect costs, through separate cost groupings, should be excluded from the indirect costs allocable to the service agreements.

H. *Indirect cost rates for educational service agreements.* An indirect cost rate should be determined for the educational service agreement pool or pools, as established under section G above. The rate in each case should be stated as the percentage which the amount of the particular educational service agreement pool is of the total direct salaries and wages of all educational service agreements identified with such pool. Indirect costs should be distributed to individual agreements by applying the rate or rates established to direct salaries and wages for each agreement. When a fixed rate is negotiated in advance of a fiscal year, the over- or under-recovery for that year may be included as an adjustment to the indirect cost for the next rate negotiation as in sections G.4. and G.5. of Part I.

I. *General standards for selected items of cost.* The standards for selected items of cost as set forth in sections J.1. through

.46. of Part I applicable to research agree- nents will also be applied to educational ervice agreements with the following modi- ications:

1. *Commencement and convocation costs section J.5.*). Expenses incurred for convo- ations and commencements apply to the in- truction activity as a whole. Such expenses re unallowable as direct costs of education- l service agreements unless specifically au- horized in the agreement or approved in riting by the sponsoring agency. For eligi- ility of allocation as indirect costs, see sec- ion D.

2. *Compensation for personal services section J.7.*). Charges to educational service greements for personal services will nor- nally be determined and supported consist- nt with the provisions of section J.7. of Part I. However, the provision for stipulated alary support will not be used for educa- ional service agreements. Also, charges may nclude compensation in excess of the base alary of a faculty member for the conduct f courses outside the normal duties of such member provided that: (a) Extra charges re determined at a rate not greater than he basic salary rate of the member; (b) alary payments for such work follow prac- ices consistently applied within the institu- ion; and (c) specific authorization for such charges is included in the educational serv- ce agreement.

3. *Scholarships and student aid costs* (sec- *tion J.35.*). Expenses incurred for scholarships and student aid are unallowable as either direct costs or indirect costs of educational service agreements, unless specifically authorized in the educational service agreement or approved in writing by the sponsoring agency.

4. *Student activity costs* (*section J.40.*). Expenses incurred for student activities are unallowable as either direct costs or indirect costs of educational service agreements, unless specifically authorized in the educational service agreement or approved in writing by the sponsoring agency.

5. *Student services costs* (*section J.41.*). Expenses incurred for student services are unallowable as direct costs of educational service agreements unless specifically authorized in the agreement or approved in writing by the sponsoring agency. For eligibility of allocation as indirect costs, see section D.

APPENDIX E—PRINCIPLES FOR DETERMINING COSTS APPLICABLE TO RESEARCH AND DEVELOPMENT UNDER GRANTS AND CONTRACTS WITH HOSPITALS

I. PURPOSE AND SCOPE

A. *Objectives.* This appendix provides principles for determining the costs applicable to research and development work performed by hospitals under grants and contracts with the Department of Education. These principles are confined to the subject of cost determination and make no attempt to identify the circumstances or dictate the extent of hospital participation in the financing of a particular research or development project. The principles are designed to provide recognition of the full allocated costs of such research work under generally accepted accounting principles. These principles will be applicable to both proprietary and non-profit hospitals. No provision for profit or other increment above cost is provided for in these principles. However, this is not to be interpreted as precluding a negotiated fee between contracting parties when a fee is appropriate.

B. *Policy guides.* The successful application of these principles requires development of mutual understanding between representatives of hospitals and of the Department of Education as to their scope, applicability and interpretation. It is recognized that:

1. The arrangements for hospital participation in the financing of a research and development project are properly subject to negotiation between the agency and the hospital concerned in accordance with such Government-wide criteria as may be applicable.

2. Each hospital, possessing its own unique combination of staff, facilities and experience, should be encouraged to conduct research in a manner consonant with its own institutional philosophies and objectives.

3. Each hospital in the fulfillment of its contractual obligations should be expected to employ sound management practices.

4. The application of the principles established herein shall be in conformance with the generally accepted accounting practices of hospitals.

5. Hospitals receive reimbursements from the Federal Government for differing types of services under various programs such as support of Research and Development (including discrete clinical centers) Health Services Projects, Medicare, etc. It is essential that consistent procedures for determining reimbursable costs for similar services be employed without regard to program differences. Therefore, both the direct and in-

direct costs of research programs must be identified as a cost center(s) for the cost finding and step-down requirements of the Medicare program, or in its absence the Medicaid program.

C. *Application.* When the Department of Education sponsors research and development work in hospitals, it will apply these principles and related policy guides in determining the costs incurred for such work under grants and cost-reimbursement type contracts and subcontracts. These principles will also be used as a guide in the pricing of fixed-price contracts and subcontracts.

II. DEFINITIONS OF TERMS

A. "Organized research" means all research activities of a hospital that may be identified whether the support for such research is from a federal, non-federal or internal source.

B. "Departmental research" means research activities that are not separately budgeted and accounted for. Such work, which includes all research activities not encompassed under the term organized research, is regarded for purposes of this document as a part of the patient care activities of the hospital.

C. "Research agreement" means any valid arrangement to perform federally-sponsored research or development including grants, cost-reimbursement type contracts, cost-reimbursement type subcontracts, and fixed-price contracts and subcontracts.

D. "Instruction and training" means the formal or informal programs of educating and training technical and professional health services personnel, primarily medical and nursing training. This activity, if separately budgeted or identifiable with specific costs, should be considered as a cost objective for purposes of indirect cost allocations and the development of patient care costs.

E. "Other hospital activities" means all organized activities of a hospital not immediately related to the patient care, research, and instructional and training functions which produce identifiable revenue from the performance of these activities. If a non-related activity does not produce identifiable revenue, it may be necessary to allocate this expense using an appropriate basis. In such a case, the activity may be included as an allocable cost (See paragraph III D below.) Also included under this definition is any category of cost treated as "Unallowable," provided such category of cost identifies a function or activity to which a portion of the institution's indirect cost (as defined in paragraph V. A.) are properly allocable.

F. "Patient care" means those departments or cost centers which render routine or ancillary services to in-patients and/or out-patients. As used in paragraph IX B.23, it means the cost of these services applicable to patients involved in research programs.

G. "Allocation" means the process by which the indirect costs are assigned as between:

1. Organized research,
2. Patient care including departmental research.
3. Instruction and training, and
4. Other hospital activities.

H. "Cost center" means an identifiable department or area (including research) within the hospital which has been assigned an account number in the hospital accounting system for the purpose of accumulating expense by department or area.

I. "Cost finding" is the process of recasting the data derived from the accounts ordinarily kept by a hospital to ascertain costs of the various types of services rendered. It is the determination of direct costs by specific identification and the proration of indirect costs by allocation.

J. "Step down" is a cost finding method that recognizes that services rendered by certain nonrevenue-producing departments or centers are utilized by certain other nonrevenue producing centers as well as by the revenue-producing centers. All costs of nonrevenue-producing centers are allocated to all centers which they serve, regardless of whether or not these centers produce revenue. Following the apportionment of the cost of the nonrevenue-producing center, that center will be considered closed and no further costs are apportioned to that center.

K. "Scatter bed" is a bed assigned to a research patient based on availability. Research patients occupying these beds are not physically segregated from nonresearch patients occupying beds. Scatter beds are geographically dispersed among all the beds available for use in the hospital. There are no special features attendant to a scatter bed that distinguishes it from others that could just as well have been occupied.

L. "Discrete bed" is a bed or beds that have been set aside for occupancy by research patients and are physically segregated from other hospital beds in an environment that permits an easily ascertainable allocation of costs associated with the space they occupy and the services they generate.

II. BASIC CONSIDERATIONS

A. *Composition of total costs.* The cost of a research agreement is comprised of the allowable direct costs incident to its performance plus the allocable portion of the allowable indirect costs of the hospital less applicable credits. (See paragraph III-E.)

B. *Factors affecting allowability of costs.* The tests of allowability of costs under these principles are:

1. They must be reasonable.

2. They must be assigned to research
reements under the standards and meth-
s provided herein.
3. They must be accorded consistent treat-
ent through application of those generally
cepted accounting principles appropriate
the circumstances (See paragraphs I-
5.) and
4. They must conform to any limitations
exclusions set forth in these principles or
the research agreement as to types or
nounts of cost items.
C. *Reasonable costs.* A cost may be consid-
ed reasonable if the nature of the goods
services acquired or applied, and the
nount involved therefor reflect the action
at a prudent person would have taken
der the circumstances prevailing at the
ne the decision to incur the cost was
ade. Major considerations involved in the
termination of the reasonableness of a
st are:
1. Whether or not the cost is of a type
nerally recognized as necessary for the
eration of the hospital or the perform-
ce of the research agreement,
2. The restraints or requirements imposed
such factors as arm's length bargaining,
deral and state laws and regulations, and
search agreement terms and conditions,
3. Whether or not the individuals con-
rned acted with due prudence in the cir-
mstances, considering their responsibil-
es to the hospital, its patients, its employ-
s, its students, the Government, and the
blic at large, and
4. The extent to which the actions taken
th respect to the incurrence of the cost
e consistent with established hospital
licies and practices applicable to the work
the hospital generally, including Govern-
ent research.
D. *Allocable costs.* 1. A cost is allocable to
particular cost center (i.e., a specific func-
on, project, research agreement, depart-
ent, or the like) if the goods or services in-
lved are chargeable or assignable to such
st center in accordance with relative bene-
s received or other equitable relationship.
bject to the foregoing, a cost is allocable
a research agreement if it is incurred
lely to advance the work under the re-
arch agreement; or it benefits both the re-
arch agreement and other work of the
spital in proportions that can be approxi-
ated through use of reasonable methods;
it is necessary to the overall operation of
e hospital and, in light of the standards
ovided in this chapter, is deemed to be as-
gnable in part to organized research.
here the purchase of equipment or other
pital items are specifically authorized
der a research agreement, the amounts
us authorized for such purchases are allo-
ble to the research agreement regardless
the use that may subsequently be made
of the equipment or other capital items involved.

2. Any costs allocable to a particular research agreement under the standards provided in these principles may not be shifted to other research agreements in order to meet deficiencies caused by overruns or other fund considerations, to avoid restrictions imposed by law or by terms of the research agreement, or for other reasons of convenience.

E. *Applicable credits.* 1. The term applicable credits refers to those receipts or negative expenditure types of transactions which operate to offset or reduce expense items that are allocable to research agreements as direct or indirect costs as outlined in paragraph V-A. Typical examples of such transactions are: Purchase discounts, rebates, or allowances; recoveries or indemnities on losses; sales of scrap or incidental services; tuition; adjustments of overpayments or erroneous charges; and services rendered to patients admitted to federally funded clinical research centers, primarily for care though also participating in research protocols.

2. In some instances, the amounts received from the Federal Government to finance hospital activities or service operations should be treated as applicable credits. Specifically, the concept of netting such credit items against related expenditures should be applied by the hospital in determining the rates or amounts to be charged to government research for services rendered whenever the facilities or other resources used in providing such services have been financed directly, in whole or in part, by federal funds. Thus, where such items are provided for or benefit a particular hospital activity, i.e., patient care, research, instruction and training, or other, they should be treated as an offset to the indirect costs apportioned to that activity. Where the benefits are common to all hospital activities they should be treated as a credit to the total indirect cost pool before allocation to the various cost objectives.

IV. DIRECT COSTS

A. *General.* Direct costs are those that can be identified specifically with a particular cost center. For this purpose, the term cost center refers not only to the ultimate centers against which costs are finally lodged such as research agreements, but also to other established cost centers such as the individual accounts for recording particular objects or items of expense, and the separate account groupings designed to record the expenses incurred by individual organizational units, functions, projects and the like. In general, the administrative functions and service activities described in paragraph VI are identifiable as separate cost centers, and the expenses associated with such centers become eligible in due course for distribution as indirect costs of research agreements and other ultimate cost centers.

B. *Application to research agreements.* Identifiable benefit to the research work rather than the nature of the goods and services involved is the determining factor in distinguishing direct from indirect costs of research agreements. Typical of transactions chargeable to a research agreement as direct costs are the compensation of employees for the time or effort devoted to the performance of work under the research agreement, including related staff benefit and pension plan costs to the extent that such items are consistently accorded to all employees and treated by the hospital as direct rather than indirect costs (see paragraph V. B4b), the costs of materials consumed or expended in the performance of such work; and other items of expense incurred for the research agreement, such as extraordinary utility consumption. The cost of materials supplied from stock or services rendered by specialized facilities or other institutional service operations may be included as direct costs of research agreements provided such items are consistently treated by the institution as direct rather than indirect costs and are charged under a recognized method of costing or pricing designed to recover only the actual direct and indirect costs of such material or service and conforming to generally accepted cost accounting practices consistently followed by the institution.

V. INDIRECT COSTS

A. *General.* Indirect costs are those that have been incurred for common or joint objectives, and thus are not readily subject to treatment as direct costs of research agreements or other ultimate or revenue producing cost centers. In hospitals such costs normally are classified but not necessarily restricted to the following functional categories: Depreciation; Administrative and General (including fringe benefits if not charged directly); Operation of Plant; Maintenance of Plant; Laundry and Linen Service; Housekeeping; Dietary; Maintenance of Personnel; and Medical Records and Library.

B. *Criteria for distribution*—1. *Base period.* A base period for distribution of indirect costs is the period during which such costs are incurred and accumulated for distribution to work performed within that period. The base period normally should coincide with the fiscal year established by the hospital, but in any event the base period should be so selected as to avoid inequities in the distribution of costs.

2. *Need for cost groupings.* The overall objective of the allocation process is to distribute the indirect costs described in paragraph VI to organized research, patient care, instruction and training, and other hospital activities in reasonable proportions consistent with the nature and extent of the use of the hospital's resources by research personnel, medical staff, patients, students, and other personnel or organizations. In order to achieve this objective with reasonable precision, it may be necessary to provide for selective distribution by establishing separate groupings of cost within one or more of the functional categories of indirect costs referred to in paragraph V-A. In general, the cost groupings established within a functional category should constitute, in each case, a pool of those items of expense that are considered to be of like character in terms of their relative contribution to (or degree of remoteness from) the particular cost centers to which distribution is appropriate. Each such pool or cost grouping should then be distributed individually to the related cost centers, using the distribution base or method most appropriate in the light of the guides set out in section B.3. below. While this paragraph places primary emphasis on a step-down method of indirect cost computation, paragraph VIII provides an alternate method which may be used under certain conditions.

3. *Selection of distribution method.* Actual conditions must be taken into account in selecting the method or base to be used in distributing to related cost centers the expenses assembled under each of the individual cost groups established as indicated under section B.2. above. Where a distribution can be made by assignment of a cost grouping directly to the area benefited, the distribution should be made in that manner. Care should be given, however, to eliminate similar or duplicative costs from any other distribution made to this area. Where the expenses under a cost grouping are more general in nature, the distribution to related cost centers should be made through use of a selected base which will produce results which are equitable to both the Government and the hospital. In general, any cost element or cost-related factor associated with the hospital's work is potentially adaptable for use as a distribution base provided:

a. It can readily be expressed in terms of dollars or other quantitative measure (total direct expenditures, direct salaries, manhours applied, square feet utilized, hours of usage, number of documents processed, population served, and the like); and

b. It is common to the related cost centers during the base period. The essential consideration in selection of the distribution base in each instance is that it be the one best suited for assigning the pool of costs to related cost centers in accord with the relative benefits derived; the traceable cause and effect relationship; or logic and reason where neither benefit nor cause and effect relationship is determinable.

4. *General consideration on cost groupings.* The extent to which separate cost groupings and selective distribution would be appropriate at a hospital is a matter of judgment to be determined on a case-by-case basis. Typical situations which may warrant the establishment of two or more separate cost groups (based on account classification or analysis) within a functional category include but are not limited to the following:

a. Where certain items or categories of expense relate solely to one of the major divisions of the hospital (patient care, sponsored research, instruction and training, or other hospital activities) or to any two but not all, such expenses should be set aside as a separate cost grouping for direct assignment or selective distribution in accordance with the guides provided in sections B.2. and B.3. above.

b. Where any types of expense ordinary treated as indirect cost as outlined in paragraph V-A are charged to research agreements as direct costs, the similar type expenses applicable to other activities of the institution must through separate cost grouping be excluded from the indirect costs allocable to research agreements.

c. Where it is determined that certain expenses are for the support of a service unit or facility whose output is susceptible of measurement on a workload or other quantitative basis, such expenses should be set aside as a separate cost grouping for distribution on such basis to organized research and other hospital activities.

d. Where organized activities (including identifiable segments of organized research as well as the activities cited in paragraph II-E) provide their own purchasing, personnel administration, building maintenance, or housekeeping or similar service, the distribution of such elements of indirect cost to such activities should be accomplished through cost grouping which includes only that portion of central indirect costs (such as for overall management) which are properly allocable to such activities.

e. Where the hospital elects to treat as indirect charges the costs of pension plans and other staff benefits, such costs should be set aside as a separate cost grouping for selective distribution to related cost centers, including organized research.

f. Where the hospital is affiliated with a medical school or some other institution which performs organized research on the hospital's premises, every effort should be made to establish separate cost groupings in the Administrative and General or other applicable category which will reasonably reflect the use of services and facilities by such research. (See also paragraph VII-A.3)

5. *Materiality.* Where it is determined that the use of separate cost groupings and selective distribution are necessary to produce equitable results, the number of such separate cost groupings within a functional category should be held within practical limits, after taking into consideration the materiality of the amounts involved and the degree of precision attainable through less selective methods of distribution.

C. *Administration of limitations on allowances for indirect costs.* 1. Research grants may be subject to laws and/or administrative regulations that limit the allowance for indirect costs under each such grant to a stated percentage of the direct costs allowed. Agencies that sponsor such grants will establish procedures which will assure that:

a. The terms and amount authorized in each case conform with the provisions of paragraphs III, V and IX of these principles as they apply to matters involving the consistent treatment and allowability of individual items of cost; and

b. The amount actually allowed for indirect costs under each such research grant does not exceed the maximum allowable under the limitation or the amount otherwise allowable under these principles, whichever is the smaller.

2. Where the actual allowance for indirect costs on any research grant must be restricted to the smaller of the two alternative amounts referred to in C1 above, such alternative amounts should be determined in accordance with the following guides:

a. The maximum allowable under the limitation should be established by applying the stated percentage to a direct cost base which shall include all items of expenditure authorized by the sponsoring agency for inclusion as part of the total cost for the direct benefit of the work under the grant; and

b. The amount otherwise allowable under these principles should be established by applying the current institutional indirect cost rate to those elements of direct cost which were included in the base on which the rate was computed.

3. When the maximum amount allowable under a statutory limitation or the terms of a research agreement is less than the amount otherwise allocable as indirect costs under these principles, the amount not recoverable as indirect costs under the research agreement involved may not be shifted to other research agreements.

VI. IDENTIFICATION AND ASSIGNMENT OF INDIRECT COSTS

A. *Depreciation or use charge.* 1. The expenses under this heading should include depreciation (as defined in paragraph IX-B.9a) on buildings, fixed equipment, and movable equipment, except to the extent purchased through federal funds. Where adequate records for the recording of depreciation are not available, a use charge may be substituted for depreciation (See paragraph IX-B.)

2. The expenses included in this category should be allocated to applicable cost centers in a manner consistent with the guides set forth in paragraph V-B, on a basis that gives primary emphasis to (a) space utilization with respect to depreciation on buildings and fixed equipment; and (b) specific identification of assets and their use with respect to movable equipment as it relates to patient care, organized research, instruction and training, and other hospital activities. Where such records are not sufficient for the purpose of the foregoing, reasonable estimates will suffice as a means for effecting distribution of the amounts involved.

B. *Administration and general expenses.* 1. The expenses under this heading are those that have been incurred for the administrative offices of the hospital including accounting, personnel, purchasing, information centers, telephone expense, and the like which do not relate solely to any major division of the institution, i.e., solely to patient care, organized research, instruction and training, or other hospital activities.

2. The expenses included in this category may be allocated on the basis of total expenditures exclusive of capital expenditures, or salaries and wages in situations where the results of the distribution made on this basis are deemed to be equitable both to the Government and the hospital; otherwise the distribution of Administration and General expenses should be made through use of selected bases, applied to separate cost groupings established within this category of expenses in accordance with the guides set out in paragraph V-B.

C. *Operation of plant.* 1. The expenses under this heading are those that have been incurred by a central service organization or at the departmental level for the administration, supervision, and provision of utilities (exclusive of telephone expense) and protective services to the physical plant. They include expenses incurred for such items as power plant operations, general utility costs, elevator operations, protection services, and general parking lots.

2. The expenses included in this category should be allocated to applicable cost centers in a manner consistent with the guides provided in paragraph V-B, on a basis that gives primary emphasis to space utilization. The allocations should be developed as follows:

a. Where actual space and related cost records are available or can readily be developed and maintained without significant change in the accounting practices, the amount distributed should be based on such records;

b. Where the space and related cost records maintained are not sufficient for purposes of the foregoing, a reasonable estimate of the proportion of total space assigned to the various cost centers normally will suffice as a means for effecting distribution of the amounts involved; or

c. Where it can be demonstrated that an area or volume or space basis of allocation is impractical or inequitable, other bases may be used provided consideration is given to the use of facilities by research personnel and others, including patients.

D. *Maintenance of plant.* 1. The expenses under this heading should include:

a. All salaries and wages pertaining to ordinary repair and maintenance work performed by employees on the payroll of the hospital;

b. All supplies and parts used in the ordinary repairing and maintaining of buildings and general equipment; and

c. Amounts paid to outside concerns for the ordinary repairing and maintaining of buildings and general equipment.

2. The expenses included in this category should be allocated to applicable cost centers in a manner consistent with the guides provided in paragraph V-B, on a basis that gives primary emphasis to space utilization. The allocations and apportionments should be developed as follows:

a. Where actual space and related cost records are available and can readily be developed and maintained without significant change in the accounting practices, the amount distributed should be based on such records;

b. Where the space and related cost records maintained are not sufficient for purposes of the foregoing, a reasonable estimate of the proportion of total space assigned to the various cost centers normally will suffice as a means for effecting distribution of the amounts involved; or

c. Where it can be demonstrated that an area or volume of space basis of allocation is impractical or inequitable, other basis may be used provided consideration is given to the use of facilities by research personnel and others, including patients.

E. *Laundry and linen.* 1. The expenses under this heading should include:

a. Salaries and wages of laundry department employees, seamstresses, clean linen handlers, linen delivery men, etc.;

b. Supplies used in connection with the laundry operation and all linens purchased; and

c. Amounts paid to outside concerns for purchased laundry and/or linen service.

2. The expense included in this category should be allocated to related cost centers in a manner consistent with the guides provid-

in paragraph V-B. on a basis that gives
mary emphasis to actual pounds of linen
ed. The allocations should be developed as
lows:

. Where actual poundage and related cost
ords are available or can readily be devel-
ed and maintained without significant
ange in the accounting practices, the
ount distributed should be based on such
ords;

. Where it can be demonstrated that a
undage basis of allocation is impractical
inequitable other bases may be used pro-
ed consideration is given to the use of
en by research personnel and others, in-
ding patients.

. *Housekeeping.* 1. The expenses under
s heading should include:

. All salaries and wages of the depart-
nt head, foreman, maids, porters, jani-
s, wall washers, and other housekeeping
ployees;

. All supplies used in carrying out the
usekeeping functions; and

. Amounts paid to outside concerns for
rchased services such as window washing,
ect extermination, etc.

. The expenses included in this category
uld be allocated to related cost centers in
anner consistent with the guides provid-
in paragraph V-B. on a basis that gives
mary emphasis to space actually serviced
the housekeeping department. The allo-
ions and apportionments should be devel-
ed as follows:

. Where actual space serviced and related
t records are available or can readily be
eloped and maintained without signifi-
t change in the accounting practices, the
ount distributed should be based on such
ords;

. Where the space serviced and related
t records maintained are not sufficient
purposes of the foregoing, a reasonable
imate of the proportion of total space as-
ned to the various cost centers normally
l suffice as a means for effecting distribu-
n of the amounts of housekeeping ex-
ses involved; or

. Where it can be demonstrated that the
ce serviced basis of allocation is impracti-
or inequitable, other bases may be used
vided consideration is given to the use of
usekeeping services by research personnel
d others, including patients.

. *Dietary.* 1. These expenses, as used
rein, shall mean only the subsidy provid-
by the hospital to its employees includ-
research personnel through its cafeteria
eration. The hospital must be able to
monstrate through the use of proper cost
counting techniques that the cafeteria op-
ates at a loss to the benefit of employees.

. The reasonable operating loss of a sub-
ized cafeteria operation should be allo-
ed to related cost centers in a manner
sistent with the guides provided in paragraph V-B. on a basis that gives primary emphasis to number of employees.

H. *Maintenance (housing) of personnel.* 1. The expenses under this heading should include:

a. The salaries and wages of matrons, clerks, and other employees engaged in work in nurses' residences and other employees' quarters;

b. All supplies used in connection with the operation of such dormitories; and

c. Payments to outside agencies for the rental of houses, apartments, or rooms used by hospital personnel.

2. The expenses included in this category should be allocated to related cost centers in a manner consistent with the guides provided in paragraph V-B. on a basis that gives primary emphasis to employee utilization of housing facilities. The allocation should be developed as follows:

a. Appropriate credit should be given for all payments received from employees or otherwise to reduce the expense to be allocated;

b. A net cost per housed employee may then be computed; and

c. Allocation should be made on a departmental basis based on the number of housed employees in each respective department.

I. *Medical records and library.* 1. The expenses under this heading should include:

a. The salaries and wages of the records librarian, medical librarian, clerks, stenographers, etc.; and

b. All supplies such as medical record forms, chart covers, filing supplies, stationery, medical library books, periodicals, etc.

2. The expenses included in this category should be allocated to related cost centers in a manner consistent with the guides provided in paragraph V-B. on a basis that gives primary emphasis to a special time survey of medical records personnel. If this appears to be impractical or inequitable, other bases may be used provided consideration is given to the use of these facilities by research personnel and others, including patients.

VII. DETERMINATION AND APPLICATION OF INDIRECT COST RATE OR RATES

A. *Indirect cost pools.* 1. Subject to paragraph (2) below, indirect costs allocated to organized research should be treated as a common pool, and the costs in such common pool should be distributed to individual research agreements benefiting therefrom on a single rate basis.

2. In some instances a single rate basis for use on all government research at a hospital may not be appropriate since it would not take into account those different environmental factors which may affect substantially the indirect costs applicable to a particular segment of government research at the institution. For this purpose, a particu-

lar segment of government research may be that performed under a single research agreement or it may consist of research under a group of research agreements performed in a common environment. The environmental factors are not limited to the physical location of the work. Other important factors are the level of the administrative support required, the nature of the facilities or other resources employed, the scientific disciplines or technical skills involved, the organizational arrangements used, or any combination thereof. Where a particular segment of government research is performed within an environment which appears to generate a significantly different level of indirect costs, provision should be made for a separate indirect cost pool applicable to such work. An example of this differential may be in the development of a separate indirect cost pool for a clinical research center grant. The separate indirect cost pool should be developed during the course of the regular distribution process, and the separate indirect cost rate resulting therefrom should be utilized provided it is determined that:

a. Such indirect cost rate differs significantly from that which would have obtained under paragraph (1) above; and

b. The volume of research work to which such rate would apply is material in relation to other government research at the institution.

3. It is a common practice for grants or contracts awarded to other institutions, typically University Schools of Medicine, to be performed on hospital premises. In these cases the hospital should develop a separate indirect cost pool applicable to the work under such grants or contracts. This pool should be developed by a selective distribution of only those indirect cost categories which benefit the work performed by the other institution, within the practical limits dictated by available data and the materiality of the amounts involved. Hospital costs determined to be allocable to grants or contracts awarded to another institution may not be recovered as a cost of grants or contracts awarded directly to the hospital.

B. *The distribution base.* Preferably, indirect costs allocated to organized research should be distributed to applicable research agreements on the basis of direct salaries and wages. However, where the use of salaries and wages results in an inequitable allocation of costs to the research agreements, total direct costs or a variation thereof, may be used in lieu of salaries and wages. Regardless of the base used, an indirect cost rate should be determined for each of the separate indirect cost pools developed pursuant to paragraph VII-A. The rate in each case should be stated as the percentage which the amount of the particular indirect cost pool is of the total direct salaries and wages (or other base selected) for all research agreements identified with such a pool.

C. *Negotiated lump sum for overhead.* A negotiated fixed amount in lieu of indirect costs may be appropriate for self-contained or off-campus research activities where the benefits derived from a hospital's indirect services cannot be readily determined. Such amount negotiated in lieu of indirect costs will be treated as an offset to the appropriate indirect cost pool after allocation to patient care, organized research, instruction and training, and other hospital activities. The base on which such remaining expenses are allocated should be appropriately adjusted.

D. *Predetermined overhead rates.* The utilization of predetermined fixed overhead rates may offer potential advantages in the administration of research agreements by facilitating the preparation of research budgets and permitting more expeditious close out of the agreements when the work is completed. Therefore, to the extent allowed by law, consideration may be given to the negotiation of predetermined fixed rates in those situations where the cost experience and other pertinent factors available are deemed sufficient to enable the Government and the hospital to reach a reasonable conclusion as to the probable level of the indirect cost rate for the ensuing accounting period.

VIII. SIMPLIFIED METHOD FOR SMALL INSTITUTIONS

A. *General.* 1. Where the total direct cost of all government-sponsored research and development work at a hospital in a year is minimal, the use of the abbreviated procedure described in paragraph VIII-B below may be acceptable in the determination of allowable indirect costs. This method may also be used to initially determine a provisional indirect cost rate for hospitals that have not previously established a rate. Under this abbreviated procedure, data taken directly from the institution's most recent annual financial report and immediately available supporting information will be utilized as a basis for determining the indirect cost rate applicable to research agreements at the institution.

2. The rigid formula approach provided under the abbreviated procedure has limitations which may preclude its use at some hospitals either because the minimum data required for this purpose are not readily available or because the application of the abbreviated procedure to the available data produces results which appear inequitable to the Government or the hospital. In any such case, indirect costs should be determined through use of the regular procedure rather than the abbreviated procedure.

3. In certain instances where the total direct cost of all government-sponsored research and development work at the hospital is more than minimal, the abbreviated procedure may be used if prior permission is obtained. This alternative will be granted only in those cases where it can be demonstrated that the step-down technique cannot be followed.

B. *Abbreviated procedure.* 1. Total expenditures as taken from the most recent annual financial report will be adjusted by eliminating from further consideration expenditures for capital items as defined in paragraph IX-B.4 and unallowable costs as defined under various headings in paragraph IX and paragraph III-E.

2. Total expenditures as adjusted under the foregoing will then be distributed among (a) expenditures applicable to administrative and general overhead functions, (b) expenditures applicable to all other overhead functions, and (c) expenditures for all other purposes. The first group shall include amounts associated with the functional categories, Administration and General, and Dietary, as defined in paragraph VI. The second group shall include Depreciation, Operation of Plant, Maintenance of Plant, and Housekeeping. The third group—expenditures for all other purposes—shall include the amounts applicable to all other activities, namely, patient care, organized research, instruction and training, and other hospital activities as defined under paragraph II-E. For the purposes of this section, the functional categories of Laundry and Linen, Maintenance of Personnel, and Medical Records and Library as defined in paragraph VI shall be considered as expenditures for all other purposes.

3. The expenditures distributed to the first two groups in paragraph VIII-B.2 should then be adjusted by those receipts or negative expenditure types of transactions which tend to reduce expense items allocable to research agreements as indirect costs. Examples of such receipts or negative expenditures are itemized in paragraph III-E.1.

4. In applying the procedures in paragraphs VIII-B.1 and B.2, the cost of unallowable activities such as Gift Shop, Investment Property Management, Fund Raising, and Public Relations, when they benefit from the hospital's indirect cost services, should be treated as expenditures for all other purposes. Such activities are presumed to benefit from the hospital's indirect cost services when they include salaries of personnel working in the hospital. When they do not include such salaries, they should be eliminated from the indirect cost rate computation.

5. The indirect cost rate will then be computed in two stages. The first stage requires the computation of an Administrative and General rate component. This is done by applying a ratio of research direct costs over total direct costs to the Administrative and General pool developed under paragraphs VIII-B.2 and B.3 above. The resultant amount—that which is allocable to research—is divided by the direct research cost base. The second stage requires the computation of an All Other Indirect Cost rate component. This is done by applying a ratio of research direct space over total direct space to All Other Indirect Cost pool developed under paragraphs VIII-B.2 and B.3 above. The resultant amount—that which is allocable to research—is divided by the direct research cost base.

The total of the two rate components will be the institution's indirect cost rate. For the purposes of this section, the research direct cost or space and total direct cost or space will be that cost or space identified with the functional categories classified under Expenditures for all other purposes under paragraph VIII-B.2.

IX. GENERAL STANDARDS FOR SELECTED ITEMS OF COST

A. *General.* This section provides standards to be applied in establishing the allowability of certain items involved in determining cost. These standards should apply irrespective of whether a particular item of cost is properly treated as direct cost or indirect cost. Failure to mention a particular item of cost in the standards is not intended to imply that it is either allowable or unallowable; rather, determination as to allowability in each case should be based on the treatment or standards provided for similar or related items of cost. In case of discrepancy between the provisions of a specific research agreement and the applicable standards provided, the provisions of the research agreement should govern. However, in some cases advance understandings should be reached on particular cost items in order that the full costs of research be supported. The extent of allowability of the selected items of cost covered in this section has been stated to apply broadly to many accounting systems in varying environmental situations. Thus, as to any given research agreement, the reasonableness and allocability of certain items of costs may be difficult to determine, particularly in connection with hospitals which have medical school or other affiliations. In order to avoid possible subsequent disallowance or dispute based on unreasonableness or nonallocability, it is important that prospective recipients of federal funds particularly those whose work is predominantly or substantially with the Government, seek agreement with the Government in advance of the incurrence of special or unusual costs in categories where reasonableness or allocability are difficult to determine. Such agreement may also be initiated by the Government. Any such agreement should be incorporated in the research agreement itself. However, the absence of such an advance agreement on any element of cost will not in itself serve to make that element either allowable or unallowable. Examples of costs on which advance agreements may be particularly important are:

1. Facilities costs, such as;
   a. Depreciation;
   b. Rental;
   c. Use charges for fully depreciated assets;
   d. Idle facilities and idle capacity;
   e. Plant reconversion;
   f. Extraordinary or deferred maintenance and repair;
   g. Acquisition of automatic data processing equipment.
2. Preaward costs;
3. Non-hospital professional activities;
4. Self-insurance;
5. Support services charged directly (computer services, printing and duplicating services, etc.);
6. Employee compensation, travel, and other personnel costs, including;
   a. Compensation for personal service, including wages and salaries, bonuses and incentives, premium payments, pay for time not worked, and supplementary compensation and benefits, such as pension and retirement, group insurance, severance pay plans, and other forms of compensation.
   b. Morale, health, welfare, and food service and dormitory costs.
   c. Training and education costs.
   d. Relocation costs, including special or mass personnel movement.

B. *Selected items*—1. *Advertising costs.* The term advertising costs means the costs of advertising media and corollary administrative costs. Advertising media include magazines, newspapers, radio and television programs, direct mail, exhibits, and the like. The only advertising costs allowable are those which are solely for;

a. The recruitment of persons required for the performance by the institution of obligations arising under the research agreement, when considered in conjunction with all other recruitment costs as set forth in paragraph IX-B.34.

b. The procurement of scarce items for the performance of the research agreement; or

c. The disposal of scrap or surplus materials acquired in the performance of the research agreement.

Costs of this nature, if incurred for more than one research agreement or for both research agreement work and other work of the institution, are allowable to the extent that the principles in paragraphs IV and V are observed.

2. *Bad debts.* Losses arising from uncollectible accounts and other claims and related collection and legal costs are unallowable except that a bad debt may be included as a direct cost of the research agreement to the extent that it is caused by a research patient and approved by the awarding agency. This inclusion is only intended to cover the situation of the patient admitted for research purposes who subsequently or in conjunction with the research receives clinical care for which a charge is made to the patient. If, after exhausting all means of collecting these charges, a bad debt results, it may be considered an appropriate charge to the research agreement.

3. *Bonding costs.* a. Bonding costs arise when the Government requires assurance against financial loss to itself or others by reason of the act or default of the hospital. They arise also in instances where the hospital requires similar assurance.

Included are such types as bid, performance, payment, advance payment, infringement, and fidelity bonds.

b. Costs of bonding required pursuant to the terms of the research agreement are allowable.

c. Costs of bonding required by the hospital in the general conduct of its business are allowable to the extent that such bonding is in accordance with sound business practice and the rates and premiums are reasonable under the circumstances.

4. *Capital expenditures.* The costs of equipment, buildings, and repairs which materially increase the value or useful life of buildings or equipment should be capitalized and are unallowable except as provided for in the research agreement.

5. *Civil defense costs.* Civil defense costs are those incurred in planning for, and the protection of life and property against the possible effects of enemy attack. Reasonable costs of civil defense measures (including costs in excess of normal plant protection costs, first-aid training and supplies, fire-fighting training, posting of additional exit notices and directions, and other approved civil defense measures) undertaken on the institution's premises pursuant to suggestions or requirements of civil defense authorities are allowable when distributed to all activities of the institution. Capital expenditures for civil defense purposes will not be allowed, but a use allowance or depreciation may be permitted in accordance with provisions set forth elsewhere. Costs of local civil defense projects not on the institution's premises are unallowable.

6. *Communication costs.* Costs incurred for telephone services, local and long distance telephone calls, telegrams, radiograms, postage, and the like are allowable.

7. *Compensation for personal services*—a. *General.* Compensation for personal services covers all remuneration paid currently or accrued to employees of the hospital for services rendered during the period of performance under government research agreements. Such remuneration includes salaries, wages, staff benefits (see paragraph IX-B.10), and pension plan costs (see paragraph IX-B.25). The costs of such remuneration are allowable to the extent that the total compensation to individual employees is reasonable for the services rendered and conforms to the established policy of the institution consistently applied, and provided that the charges for work performed directly on government research agreements and for other work allocable as indirect costs to sponsored research are determined and supported as hereinafter provided. For nonprofit, non-proprietary institutions, where federally supported programs constitute less than a preponderance of the activity at the institution the primary test of reasonableness will be to require that the institution's compensation policies be applied consistently both to federally-sponsored and nonsponsored activities alike. However, where special circumstances so dictate a contractual clause may be utilized which calls for application of the test of comparability in determining the reasonableness of compensation.

b. *Payroll distribution.* Amounts charged to organized research for personal services, regardless of whether treated as direct costs or allocated as indirect costs, will be based on hospital payrolls which have been approved and documented in accordance with generally accepted hospital practices. In order to develop necessary direct and indirect allocations of cost, supplementary data on time or effort as provided in paragraph (c) below, normally need be required only for individuals whose compensation is properly chargeable to two or more research agreements or to two or more of the following broad functional categories:

(1) Patient care;

(2) Organized research;

(3) Instruction and training;

(4) Indirect activities as defined in paragraph V-A; or

(5) Other hospital activities as defined in paragraph II-E.

c. *Reporting time or effort.* Charges for salaries and wages of individuals other than members of the professional staff will be supported by daily time and attendance and payroll distribution records. For members of the professional staff, current and reasonable estimates of the percentage distribution of their total effort may be used as support in the absence of actual time records. The term professional staff for purposes of this section includes physicians, research associates, and other personnel performing work at responsible levels of activities. These personnel normally fulfill duties, the competent performance of which usually requires persons possessing degrees from accredited institutions of higher learning and/or state licensure. In order to qualify as current and reasonable, estimates must be made no later than one month (though not necessarily a calendar month) after the month in which the services were performed.

d. *Preparation of estimates of effort.* Where required under paragraph (c) above, estimates of effort spent by a member of the professional staff on each research agreement should be prepared by the individual who performed the services or by a responsible individual such as a department head or supervisor having first-hand knowledge of the services performed on each research agreement. Estimates must show the allocation of effort between organized research and all other hospital activities in terms of the percentage of total effort devoted to each of the broad functional categories referred to in paragraph (b) above. The estimate of effort spent on a research agreement may include a reasonable amount of time spent in activities contributing and intimately related to work under the agreement, such as preparing and delivering special lectures about specific aspects of the ongoing research, writing research reports and articles, participating in appropriate research seminars, consulting with colleagues with respect to related research, and attending appropriate scientific meetings and conferences. The term "all other hospital activities" would include departmental research, administration, committee work, and public services undertaken on behalf of the hospital.

e. *Application of budget estimates.* Estimates determined before the performance of services, such as budget estimates on a monthly, quarterly, or yearly basis do not qualify as estimates of effort spent.

f. *Non-hospital professional activities.* A hospital must not alter or waive hospital-wide policies and practices dealing with the permissible extent of professional services over and above those traditionally performed without extra hospital compensation, unless such arrangements are specifically authorized by the sponsoring agency. Where hospital-wide policies do not adequately define the permissible extent of consultantships or other non-hospital activities undertaken for extra pay, the Government may require that the effort of professional staff working under research agreements be allocated as between (1) hospital activities, and (2) non-hospital professional activities. If the sponsoring agency should consider the extent of non-hospital professional effort excessive, appropriate arrangements governing compensation will be negotiated on a case by case basis.

g. *Salary rates for part-time appointments.* Charges for work performed on government research by staff members having only part-time appointments will be determined at a rate not in excess of that for which he is regularly paid for his part-time staff assignment.

8. *Contingency provisions.* Contributions to a contingency reserve or any similar provisions made for events the occurrence of which cannot be foretold with certainty as to time, intensity, or with an assurance of their happening, are unallowable.

9. *Depreciation and use allowances.* a. Hospitals may be compensated for the use of buildings, capital improvements and usable equipment on hand through depreciation or use allowances. Depreciation is a charge to current operations which distributes the cost of a tangible capital asset, less estimated residual value, over the estimated useful life of the asset in a systematic and logical manner. It does not involve a process of valuation. Useful life has reference to the prospective period of economic usefulness in the particular hospital's operations as distinguished from physical life. Use allowances are the means of allowing compensation when depreciation or other equivalent costs are not considered.

b. Due consideration will be given to government-furnished research facilities utilized by the institution when computing use allowances and/or depreciation if the government-furnished research facilities are material in amount. Computation of the use allowance and/or depreciation will exclude both the cost or any portion of the cost of grounds, buildings and equipment borne by or donated by the Federal Government, irrespective of where title was originally vested or where it presently resides, and secondly, the cost of grounds. Capital expenditures for land improvements (paved areas, fences, streets, sidewalks, utility conduits, and similar improvements not already included in the cost of buildings) are allowable provided the systematic amortization of such capital expenditures has been provided in the institution's books of accounts, based on reasonable determinations of the probable useful lives of the individual items involved, and the share allocated to organized research is developed from the amount thus amortized for the base period involved.

c. Normal depreciation on a hospital's plant, equipment, and other capital facilities, except as excluded by paragraph (d) below, is an allowable element of research cost provided that the amount thereof is computed:

1. Upon the property cost basis used by the hospital for Federal Income Tax purposes (See section 167 of the Internal Revenue Code of 1954); or

2. In the case of non-profit or tax exempt organizations, upon a property cost basis which could have been used by the hospital for Federal Income Tax purposes, had such hospital been subject to the payment of income tax; and in either case

3. By the consistent application to the assets concerned of any generally accepted accounting method, and subject to the limitations of the Internal Revenue Code of 1954 as amended, including—

i. The straight line method;

ii. The declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in paragraph (i) above;

iii. The sum of the years-digits method; and

iv. Any other consistent method productive of an annual allowance which, when added to all allowances for the period commencing with the use of the property and including the current year, does not during the first two-thirds of the useful life of the property exceed the total of such allowances which would have been used had such allowances been computed under the method described in paragraph (ii) above.

d. Where the depreciation method is followed, adequate property records must be maintained. The period of useful service (service life) established in each case for usable capital assets must be determined on a realistic basis which takes into consideration such factors as type of construction, nature of the equipment used, technological developments in the particular research area, and the renewal and replacement policies followed for the individual items or classes of assets involved. Where the depreciation method is introduced for application to assets acquired in prior years, the annual charges therefrom must not exceed the amounts that would have resulted had the depreciation method been in effect from the date of acquisition of such assets.

e. Depreciation on idle or excess facilities shall not be allowed except on such facilities as are reasonably necessary for standby purposes.

f. Where an institution elects to go on a depreciation basis for a particular class of assets, no depreciation, rental or use charge may be allowed on any such assets that would be viewed as fully depreciated; provided, however, that reasonable use charges may be negotiated for any such assets if warranted after taking into consideration the cost of the facility or item involved, the estimated useful life remaining at time of negotiation, the actual replacement policy followed in the light of service lives used for calculating depreciation, the effect of any increased maintenance charges or decreased efficiency due to age, and any other factors pertinent to the utilization of the facility or item for the purpose contemplated.

g. Hospitals which choose a depreciation allowance for assets purchased prior to 1966 based on a percentage of operating costs in lieu of normal depreciation for purposes of reimbursement under Pub. L. 89-97 (Medicare) shall utilize that method for determining depreciation applicable to organized research.

The operating costs to be used are the lower of the hospital's 1965 operating costs or the hospital's current year's allowable costs. The percent to be applied is 5 percent starting with the year 1966-67, with such percentage being uniformly reduced by one-half percent each succeeding year. The allowance based on operating costs is in addition to regular depreciation on assets acquired after 1965. However, the combined amount of such allowance on pre-1966 assets and the allowance for actual depreciation on assets acquired after 1965 may not exceed 6 percent of the hospital's allowable cost for the current year. After total depreciation has been computed, allocation methods are used to determine the share attributable to organized research.

For purposes of this section, "Operating Costs" means the total costs incurred by the hospital in operating the institution, and includes patient care, research, and other activities. "Allowable Costs" means operating costs less unallowable costs as defined in these principles; by the application of allocation methods to the total amount of such allowable costs, the share attributable to Federally-sponsored research is determined.

A hospital which elects to use this procedure under Pub. L. 89-97 and subsequently changes to an actual depreciation basis on pre-1966 assets in accordance with the option afforded under the Medicare program shall simultaneously change to an actual depreciation basis for organized research.

Where the hospital desires to change to actual depreciation but either has no historical cost records or has incomplete records, the determination of historical cost could be made through appropriate means involving expert consultation with the determination being subject to review and approval by the Department of Education.

h. Where the use allowance method is followed, the use allowance for buildings and improvements will be computed at an annual rate not exceeding two percent of acquisition cost. The use allowance for equipment will be computed at an annual rate not exceeding six and two-thirds percent of acquisition cost of usable equipment in those cases where the institution maintains current records with respect to such equipment on hand. Where the institution's records reflect only the cost (actual or estimated) of the original complement of equipment, the use allowance will be computed at an annual rate not exceeding ten percent of such cost. Original complement for this purpose means the complement of equipment initially placed in buildings to perform the functions currently being performed in such buildings; however, where a permanent change in the function of a building takes place, a redetermination of the original complement of equipment may be made at that time to establish a new original complement. In those cases where no equipment records are maintained, the institution will justify a reasonable estimate of the acquisition cost of usable equipment which may be used to compute the use allowance at an annual rate not exceeding six and two-thirds percent of such estimate.

i. Depreciation and/or use charges should usually be allocated to research and other activities as an indirect cost.

10. *Employee morale, health, and welfare costs and credits.* The costs of house publications, health or first-aid benefits, recreational activities, employees' counseling services, and other expenses incurred in accordance with the hospital's established practice or custom for the improvement of working conditions, employer-employee relations, employee morale, and employee performance, are allowable. Such costs will be equitably apportioned to all activities of the hospital. Income generated from any of these activities will be credited to the cost thereof unless such income has been irrevocably set over to employee welfare organizations.

11. *Entertainment costs.* Except as pertains to paragraph 10 above, costs incurred for amusement, social activities, entertainment, and any items relating thereto, such as meals, lodging, rentals, transportation, and gratuities are unallowable.

12. *Equipment and other facilities.* The cost of equipment or other facilities are allowable on a direct charge basis where such purchases are approved by the sponsoring agency concerned or provided for by the terms of the research agreement.

13. *Fines and penalties.* Costs resulting from violations of, or failure of the institution to comply with federal, state and local laws and regulations are unallowable except when incurred as a result of compliance with specific provisions of the research agreement, or instructions in writing from the awarding agency.

14. *Insurance and indemnification.* a. Costs of insurance required or approved and maintained pursuant to the research agreement are allowable.

b. Costs of other insurance maintained by the hospital in connection with the general conduct of its activities are allowable subject to the following limitations:

(1) Types and extent and cost of coverage must be in accordance with sound institutional practice;

(2) Costs of insurance or of any contributions to any reserve covering the risk of loss of or damage to government owned property are unallowable except to the extent that the Government has specifically required or approved such costs; and

(3) Costs of insurance on the lives of officers or trustees are unallowable except where such insurance is part of an employee plan which is not unduly restricted.

c. Contributions to a reserve for an approved self-insurance program are allowable to the extent that the types of coverage, extent of coverage, and the rates and premiums would have been allowed had insurance been purchased to cover the risks. Such contributions are subject to prior approval of the Government.

d. Actual losses which could have been covered by permissible insurance (through an approved self-insurance program or otherwise) are unallowable unless expressly provided for in the research agreement, except that costs incurred because of losses not covered under nominal deductible insurance coverage provided in keeping with sound management practice as well as minor losses not covered by insurance such as spoilage, breakage and disappearance of small hand tools which occur in the ordinary course of operations are allowable.

15. *Interest, fund raising and investment management costs.* a. Costs incurred for interest on borrowed capital or temporary use of endowment funds, however represented, are unallowable.

b. Costs of organized fund raising, including financial campaigns, endowment drives, solicitation of gifts and bequests, and similar expenses incurred solely to raise capital or obtain contributions are not allowable.

c. Costs of investment counsel and staff and similar expenses incurred solely to enhance income from investments are not allowable.

d. Costs related to the physical custody and control of monies and securities are allowable.

16. *Labor relations costs.* Costs incurred in maintaining satisfactory relations between the hospital and its employees, including costs of labor management committees, employees' publications, and other related activities are allowable.

17. *Losses on research agreements or contracts.* Any excess of costs over income under any agreement or contract of any nature is unallowable. This includes, but is not limited to, the hospital's contributed portion by reason of cost-sharing agreements, under-recoveries through negotiation of flat amounts for overhead, or legal or administrative limitations.

18. *Maintenance and repair costs.* a. Costs necessary for the upkeep of property (including government property unless otherwise provided for), which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition, are to be treated as follows:

1. Normal maintenance and repair costs are allowable;

2. Extraordinary maintenance and repair costs are allowable, provided they are allocated to the periods to which applicable for purposes of determining research costs.

b. Expenditures for plant and equipment, including rehabilitation thereof, which according to generally accepted accounting principles as applied under the hospital's established policy, should be capitalized and subjected to depreciation, are allowable only on a depreciation basis.

19. *Material costs.* Costs incurred for purchased materials, supplies and fabricated parts directly or indirectly related to the research agreement, are allowable. Purchases made specifically for the research agreement should be charged thereto at their actual prices after deducting all cash discounts, trade discounts, rebates, and allowances received by the institution. Withdrawals from general stores or stockrooms should be charged at their cost under any recognized method of pricing stores withdrawals conforming to sound accounting practices consistently followed by the hospital. Incoming transportation charges are a proper part of material cost. Direct material cost should include only the materials and supplies actually used for the performance of the research agreement, and due credit should be given for any excess materials retained or returned to vendors. Due credit should be given for all proceeds or value received for any scrap resulting from work under the research agreement. Where government donated or furnished material is used in performing the research agreement, such material will be used without charge.

20. *Memberships, subscriptions and professional activity costs.* a. Costs of the hospital's membership in civic, business, technical and professional organizations are allowable.

b. Costs of the hospital's subscriptions to civic, business, professional and technical periodicals are allowable.

c. Costs of meetings and conferences, when the primary purpose is the dissemination of technical information, are allowable. This includes costs of meals, transportation, rental of facilities, and other items incidental to such meetings or conferences.

21. *Organization costs.* Expenditures such as incorporation fees, attorneys' fees,

countants' fees, brokers' fees, fees to promoters and organizers in connection with (a) organization or reorganization of a hospital, or (b) raising capital, are unallowable.

22. *Other business expenses.* Included in this item are such recurring expenses as registry and transfer charges resulting from changes in ownership of securities issued by the hospital, cost of shareholders meetings preparation and publication of reports to shareholders, preparation and submission of required reports and forms to taxing and other regulatory bodies, and incidental costs of directors and committee meetings. The above and similar costs are allowable when allocated on an equitable basis.

23. *Patient care.* The cost of routine and ancillary or special services to research patients is an allowable direct cost of research agreements.

a. Routine services shall include the costs of the regular room, dietary and nursing services, minor medical and surgical supplies and the use of equipment and facilities for which a separate charge is not customarily made.

b. Ancillary or special services are the services for which charges are customarily made in addition to routine services, such as operating rooms, anesthesia, laboratory, BMR-EKG, etc.

c. Patient care, whether expressed as a rate or an amount, shall be computed in a manner consistent with the procedures used to determine reimbursable costs under Pub. L. 89-97 (Medicare Program) as defined under the "Principles Of Reimbursement For Provider Costs" published by the Social Security Administration of the Department of Health and Human Services. The allowability of specific categories of cost shall be in accordance with those principles rather than the principles for research contained herein. In the absence of participation in the Medicare program by a hospital, all references to the Medicare program in these principles shall be construed as meaning the Medicaid program.

i. Once costs have been recognized as allowable, the indirect costs or general service center's cost shall be allocated (stepped-down) to special service centers, and all patient and nonpatient costs centers based upon actual services received or benefiting these centers.

ii. After allocation, routine and ancillary costs shall be apportioned to scatter-bed research patients on the same basis as is used to apportion costs to Medicare patients, i.e. using either the departmental method or the combination method, as those methods are defined by the Social Security Administration; except that final settlement shall be on a grant-by-grant basis. However, to the extent that the Social Security Administration has recognized any other method of cost apportionment, that method generally shall also be recognized as applicable to the determination of research patient care costs.

iii. A cost center must be established on Medicare reimbursement forms for each discrete-bed unit grant award received by a hospital. Routine costs should be stepped-down to this line item(s) in the normal course of stepping-down costs under Medicare/Medicaid requirements. However, in stepping-down routine costs, consideration must be given to preventing a step-down of those costs to discrete-bed unit line items that have already been paid for directly by the grant, such as bedside nursing costs. Ancillary costs allocable to research discrete-bed units shall be determined and proposed in accordance with Section 23.c.ii.

d. Where federally sponsored research programs provide specifically for the direct reimbursement of nursing, dietary, and other services, appropriate adjustment must be made to patient care costs to preclude duplication and/or misallocation of costs.

24. *Patent costs.* Costs of preparing disclosures, reports and other documents required by the research agreement and of searching the art to the extent necessary to make such invention disclosures are allowable. In accordance with the clauses of the research agreement relating to patents, costs of preparing documents and any other patent costs, in connection with the filing of a patent application where title is conveyed to the Government, are allowable. (See also paragraph IX-B.36.)

25. *Pension plan costs.* Costs of the hospital's pension plan which are incurred in accordance with the established policies of the institution are allowable, provided such policies meet the test of reasonableness and the methods of cost allocation are not discriminatory, and provided appropriate adjustments are made for credits or gains arising out of normal and abnormal employee turnover or any other contingencies that can result in forfeitures by employees which inure to the benefit of the hospital.

26. *Plan security costs.* Necessary expenses incurred to comply with government security requirements including wages, uniforms and equipment of personnel engaged in plant protection are allowable.

27. *Preresearch agreement costs.* Costs incurred prior to the effective date of the research agreement, whether or not they would have been allowable thereunder if incurred after such date, are unallowable unless specifically set forth and identified in the research agreement.

28. *Professional services costs.* a. Costs of professional services rendered by the members of a particular profession who are not employees of the hospital are allowable subject to paragraphs (b) and (c) below when reasonable in relation to the services ren-

dered and when not contingent upon recovery of the costs from the Government. Retainer fees to be allowable must be reasonably supported by evidence of services rendered.

b. Factors to be considered in determining the allowability of costs in a particular case include (1) the past pattern of such costs, particularly in the years prior to the award of government research agreements on the institution's total activity; (2) the nature and scope of managerial services expected of the institution's own organizations; and (3) whether the proportion of government work to the hospital's total activity is such as to influence the institution in favor of incurring the cost, particularly where the services rendered are not of a continuing nature and have little relationship to work under government research agreements.

c. Costs of legal, accounting and consulting services, and related costs incurred in connection with organization and reorganization or the prosecution of claims against the Government are unallowable. Costs of legal, accounting and consulting services, and related costs incurred in connection with patent infringement litigation are unallowable unless otherwise provided for in the research agreement.

29. *Profits and losses on disposition of plant equipment, or other assets.* Profits or losses of any nature arising from the sale or exchange of plant, equipment, or other capital assets, including sales or exchange of either short- or long-term investments, shall be excluded in computing research agreement costs.

30. *Proposal costs.* Proposal costs are the costs of preparing bids or proposals on potential government and non-government research agreements or projects, including the development of technical data and cost data necessary to support the institution's bids or proposals. Proposal costs of the current accounting period of both successful and unsuccessful bids and proposals normally should be treated as indirect costs and allocated currently to all activities of the institution, and no proposal costs of past accounting periods will be allocable in the current period to the government research agreement. However, the institution's established practices may be to treat proposal costs by some other recognized method. Regardless of the methods used, the results obtained may be accepted only if found to be reasonable and equitable.

31. *Public information services costs.* Costs of news releases pertaining to specific research or scientific accomplishment are unallowable unless specifically authorized by the sponsoring agency.

32. *Rearrangement and alteration costs.* Costs incurred for ordinary or normal rearrangement and alteration of facilities are allowable. Special rearrangement and alteration costs incurred specifically for a project are allowable only as a direct charge when such work has been approved in advance by the sponsoring agency concerned.

33. *Reconversion costs.* Costs incurred in the restoration or rehabilitation of the institution's facilities to approximately the same condition existing immediately prior to commencement of government research agreement work, fair wear and tear excepted, are allowable.

34. *Recruiting costs.* a. Subject to paragraphs (b), (c), and (d) below, and provided that the size of the staff recruited and maintained is in keeping with workload requirements, costs of "help wanted" advertising, operating costs of an employment office necessary to secure and maintain an adequate staff, costs of operating an aptitude and educational testing program, travel costs of employees while engaged in recruiting personnel, travel costs of applicants for interviews for prospective employment, and relocation costs incurred incident to recruitment of new employees are allowable to the extent that such costs are incurred pursuant to a well managed recruitment program. Where an institution uses employment agencies, costs not in excess of standard commercial rates for such services are allowable.

b. In publications, costs of help wanted advertising that includes color, includes advertising material for other than recruitment purposes, or is excessive in size (taking into consideration recruitment purposes for which intended and normal institutional practices in this respect) are unallowable.

c. Costs of help wanted advertising, special emoluments; fringe benefits, and salary allowances incurred to attract professional personnel from other institutions that do not meet the test of reasonableness or do not conform with the established practices of the institution are unallowable.

d. Where relocation costs incurred incident to recruitment of a new employee have been allowed either as an allocable direct or indirect cost, and the newly hired employee resigns for reasons within his control within twelve months after hire, the institution will be required to refund or credit such relocations costs as were charged to the Government.

35. *Rental costs (including sale and leaseback of facilities).* a. Rental costs of land, building, and equipment and other personal property are allowable if the rates are reasonable in light of such factors as rental costs of comparable facilities and market conditions in the area, the type, life expectancy, condition, and value of the facilities leased, options available, and other provisions of the rental agreement. Application of these factors, in situations where rentals are extensively used may involve among

other considerations comparison of rental costs with the amount which the hospital would have received had it owned the facilities.

b. Charges in the nature of rent between organizations having a legal or other affiliation or arrangement such as hospitals, medical schools, foundations, etc., are allowable to the extent such charges do not exceed the normal costs of ownership such as depreciation, taxes, insurance, and maintenance, provided that no part of such costs shall duplicate any other allowed costs.

c. Unless otherwise specifically provided in the agreement, rental costs specified in sale and lease-back agreements incurred by hospitals through selling plant facilities to investment organizations such as insurance companies or to private investors, and concurrently leasing back the same facilities are allowable only to the extent that such rentals do not exceed the amount which the hospital would have received had it retained legal title to the facilities.

36. *Royalties and other costs for use of patents.* Royalties on a patent or amortization of the cost of acquiring a patent or invention or rights thereto necessary for the proper performance of the research agreement and applicable to tasks or processes thereunder are allowable unless the Government has a license or the right to free use of the patent, the patent has been adjudicated to be invalid, or has been administratively determined to be invalid, the patent is considered to be unenforceable, or the patent has expired.

37. *Severance pay.* a. Severance pay is compensation in addition to regular salaries and wages which is paid by a hospital to employees whose services are being terminated. Costs of severance pay are allowable only to the extent that such payments are required by law, by employer-employee agreement, by established policy that constitutes in effect an implied agreement on the institution's part, or by circumstances of the particular employment.

b. Severance payments that are due to normal, recurring turnover, and which otherwise meet the conditions of paragraph (a) above may be allowed provided the actual costs of such severance payments are regarded as expenses applicable to the current fiscal year and are equitably distributed among the institution's activities during that period.

c. Severance payments that are due to abnormal or mass terminations are of such conjectural nature that allowability must be determined on a case-by-case basis. However, the Government recognizes its obligation to participate to the extent of its fair share in any specific payment.

38. *Specialized service facilities operated by a hospital.* a. The costs of institutional services involving the use of highly complex and specialized facilities such as electronic computers and reactors are allowable provided the charges therefor meet the conditions of paragraph (b) or (c) below, and otherwise take into account any items of income or federal financing that qualify as applicable credits under paragraph III-E.

b. The costs of such hospital services normally will be charged directly to applicable research agreements based on actual usage or occupancy of the facilities at rates that (1) are designed to recover only actual costs of providing such services, and (2) are applied on a nondiscriminatory basis as between organized research and other work of the hospital including commercial or accommodation sales and usage by the hospital for internal purposes. This would include use of such facilities as radiology, laboratories, maintenance men used for a special purpose, medical art, photography, etc.

c. In the absence of an acceptable arrangement for direct costing as provided in paragraph (b) above, the costs incurred for such institutional services may be assigned to research agreements as indirect costs, provided the methods used achieve substantially the same results. Such arrangements should be worked out in coordination with all government users of the facilities in order to assure equitable distribution of the indirect costs.

39. *Special administrative costs.* Costs incurred for general public relations activities, catalogs, alumni activities, and similar services are unallowable.

40. *Staff and/or employee benefits.* a. Staff and/or employee benefits in the form of regular compensation paid to employees during periods of authorized absences from the job such as for annual leave, sick leave, military leave and the like are allowable provided such costs are absorbed by all hospital activities including organized research in proportion to the relative amount of time or effort actually devoted to each.

b. Staff benefits in the form of employer contributions or expenses for Social Security taxes, employee insurance, Workmen's Compensation insurance, the Pension Plan (see paragraph IX-B.25), hospital costs or remission of hospital charges to the extent of costs for individual employees or their families, and the like are allowable provided such benefits are granted in accordance with established hospital policies, and provided such contributions and other expenses whether treated as indirect costs or an increment of direct labor costs are distributed to particular research agreements and other activities in a manner consistent with the pattern of benefits accruing to the individuals or groups of employees whose salaries and wages are chargeable to such research agreements and other activities.

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41. *Taxes.* a. In general, taxes which the hospital is required to pay and which are paid or accrued in accordance with generally accepted accounting principles, and payments made to local governments in lieu of taxes which are commensurate with the local government services received are allowable except for (1) taxes from which exemptions are available to the hospital directly or which are available to the hospital based on an exemption afforded the Government and in the latter case when the sponsoring agency makes available the necessary exemption certificates, (2) special assessments on land which represent capital improvements, and (3) Federal Income Taxes.

b. Any refund of taxes, interest, or penalties, and any payment to the hospital of interest thereon attributable to taxes, interest or penalties, which were allowed as research agreement costs will be credited or paid to the Government in the manner directed by the Government provided any interest actually paid or credited to a hospital incident to a refund of tax, interest, and penalty will be paid or credited to the Government only to the extent that such interest accrued over the period during which the hospital had been reimbursed by the Government for the taxes, interest, and penalties.

42. *Transportation costs.* Costs incurred for inbound freight, express, cartage, postage and other transportation services relating either to goods purchased, in process, or delivered are allowable. When such costs can readily be identified with the items involved, they may be charged directly as transportation costs or added to the cost of such items. Where identification with the material received cannot readily be made, inbound transportation costs may be charged to the appropriate indirect cost accounts if the institution follows a consistent equitable procedure in this respect. Outbound freight, if reimbursable under the terms of the research agreement, should be treated as a direct cost.

43. *Travel costs.* a. Travel costs are the expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business of the hospital. Such costs may be charged on an actual basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two provided the method used is applied to an entire trip and not to selected days of the trip, and results in charges consistent with those normally allowed by the institution in its regular operations.

b. Travel costs are allowable subject to paragraphs (c) and (d) below when they are directly attributable to specific work under a research agreement or when they are incurred in the normal course of administration of the hospital or a department or research program thereof.

c. The difference in cost between first class air accommodations and less than first class air accommodations is unallowable except when less than first class air accommodations are not reasonably available to meet necessary mission requirements such as where less than first class accommodations would (1) require circuitous routing, (2) require travel during unreasonable hours, (3) greatly increase the duration of the flight, (4) result in additional costs which would offset the transportation savings, or (5) offer accommodations which are not reasonably adequate for the medical needs of the traveler.

d. Costs of personnel movements of a special or mass nature are allowable only when authorized or approved in writing by the sponsoring agency or its authorized representative.

44. *Termination costs applicable to contracts.* a. Contract terminations generally give rise to the incurrence of costs or to the need for special treatment of costs which would not have arisen had the contract not been terminated. Items peculiar to termination are set forth below. They are to be used in conjunction with all other provisions of these principles in the case of contract termination.

b. The cost of common items of material reasonably usable on the hospital's other work will not be allowable unless the hospital submits evidence that it could not retain such items at cost without sustaining a loss. In deciding whether such items are reasonably usable on other work of the institution, consideration should be given to the hospital's plans for current scheduled work or activities including other research agreements. Contemporaneous purchases of common items by the hospital will be regarded as evidence that such items are reasonably usable on the hospital's other work. Any acceptance of common items as allowable to the terminated portion of the contract should be limited to the extent that the quantities of such items on hand, in transit, and on order are in excess of the reasonable quantitative requirement of other work.

c. If in a particular case, despite all reasonable efforts by the hospital, certain costs cannot be discontinued immediately after the effective date of termination, such costs are generally allowable within the limitations set forth in these principles, except that any such costs continuing after termination due to the negligent or willful failure of the hospital to discontinue such costs will be considered unacceptable.

d. Loss of useful value of special tooling and special machinery and equipment is generally allowable, provided (1) such special tooling, machinery or equipment is not reasonably capable of use in the other work of the hospital; (2) the interest of the Government is protected by transfer of title or by other means deemed appropriate by the contracting officer; and (3) the loss of useful value as to any one terminated contract is limited to that portion of the acquisition cost which bears the same ratio to the total acquisition cost as the terminated portion of the contract bears to the entire terminated contract and other government contracts for which the special tooling, special machinery or equipment was acquired.

e. Rental costs under unexpired leases are generally allowable where clearly shown to have been reasonably necessary for the performance of the terminated contract, less the residual value of such leases, if (1) the amount of such rental claimed does not exceed the reasonable use value of the property leased for the period of the contract and such further period as may be reasonable; and (2) the hospital makes all reasonable efforts to terminate, assign, settle, or otherwise reduce the cost of such lease. There also may be included the cost of alterations of such leased property, provided such alterations were necessary for the performance of the contract and of reasonable restoration required by the provisions of the lease.

f. Settlement expenses including the following are generally allowable:

(1) Accounting, legal, clerical, and similar costs reasonably necessary for the preparation and presentation to contracting officers of settlement claims and supporting data with respect to the terminated portion of the contract and the termination and settlement of subcontracts; and

(2) Reasonable costs for the storage, transportation, protection, and disposition of property provided by the Government or acquired or produced by the institution for the contract.

g. Subcontractor claims including the allocable portion of claims which are common to the contract and to other work of the contractor are generally allowable.

45. *Voluntary services.* The value of voluntary services provided by sisters or other members of religious orders is allowable provided that amounts do not exceed that paid other employees for similar work. Such amounts must be identifiable in the records of the hospital as a legal obligation of the hospital. This may be reflected by an agreement between the religious order and the hospital supported by evidence of payments to the order.

PART 75—DIRECT GRANT PROGRAMS

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AUTHORITY: 20 U.S.C. 1221e-3(a)(1), unless otherwise noted.

SOURCE: 45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to Part 75 appear at 45 FR 86296, Dec. 30, 1980.

Subpart A—General

REGULATIONS THAT APPLY TO DIRECT GRANT PROGRAMS

§ 75.1 Programs to which Part 75 applies.

(a) The regulations in Part 75 apply to each direct grant program of the Department of Education.

(b) If a direct grant program does not have implementing regulations, the Secretary implements the program under the authorizing statute and, to the extent consistent with the authorizing statute, under the General Education Provisions Act and the regulations in this part. For the purposes of this part, the term "direct grant program" includes any grant program of the Department other than a program whose authorizing statute or implementing regulations provide a formula for allocating program funds among eligible States.

NOTE: See Part 76 for the general regulations that apply to programs that allocate funds among eligible States. See § 75.101(c) for a description of the information in the application notice for a discretionary grant program that does not have regulations. For a description of the two kinds of direct grant programs see § 75.200(b) for a description of a discretionary grant program and § 75.200(c) for a description of a formula grant program. Also see § 75.210 for the selection criteria for discretionary grant programs that do not have regulations.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980, as amended at 45 FR 28669, Apr. 29, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 84059, Dec. 22, 1980, 50 FR 29330, July 18, 1985; 52 FR 27803, July 24, 1987]

§ 75.2 Exceptions in program regulations to Part 75.

If a program has regulations that are not consistent with Part 75, the implementing regulations for that program identify the sections of Part 75 that do not apply.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.3 ED general grant regulations apply to these programs.

The ED general grant regulations in 34 CFR Part 74 of this title apply to the programs covered by this part. To find subjects covered under 34 CFR Part 74, look in the table of contents at the beginning of 34 CFR Part 74.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.4 Department contracts.

(a) A contract of the Department is governed by:

(1) Chapters 1 and 3 of Title 41 of the Code of Federal Regulations;

(2) Any applicable program regulations; and

(3) The request for proposals for the procurement, if any, referenced in *Commerce Business Daily*.

(b) The regulations in Part 75 do not apply to a contract of the Department unless regulations in Part 75 or a program's regulations specifically provide otherwise.

(Authority: 20 U.S.C. 1221e-3(a)(1))

ELIGIBILITY FOR A GRANT

§ 75.50 How to find out whether you are eligible.

Eligibility to apply for a grant under a program of the Department is governed by the authorizing statute and implementing regulations for that program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27803, July 24, 1987]

§ 75.51 How to prove nonprofit status.

(a) Under some programs, an applicant must show that it is a nonprofit organization. (See the definition of "nonprofit" in 34 CFR 77.1.)

(b) An applicant may show that it is a nonprofit organization by any of the following means:

(1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under Section 501(c)(3) of the Internal Revenue Code;

(2) A statement from a State taxing body or the State attorney general certifying that:

(i) The organization is a nonprofit organization operating within the State; and

(ii) No part of its net earnings may lawfully benefit any private shareholder or individual;

(3) A certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or

(4) Any item described in paragraphs (b) (1) through (3) of this section if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Subpart B—[Reserved]

Subpart C—How To Apply for a Grant

THE APPLICATION NOTICE

§ 75.100 Publication of an application notice; content of the notice.

(a) Each fiscal year the Secretary publishes application notices in the FEDERAL REGISTER that explain what kind of assistance is available for new grants under the programs that the Secretary administers.

(b) The application notice for a program explains one or more of the following:

(1) How to apply for a new grant.

(2) If preapplications are used under the program, how to preapply for a new grant.

(c)(1) Each fiscal year the Secretary informs grantees that are eligible for continuation awards under § 75.253 about the procedures used to apply for those awards.

(2) The Secretary informs the grantees by individual notice or by publication in the FEDERAL REGISTER.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86297, Dec. 30, 1980; 51 FR 20824, June 9, 1986]

§ 75.101 Information in the application notice that helps an applicant apply.

(a) The Secretary may include such information as the following in an application notice:

(1) How an applicant can get an application package that contains:

(i) Information about the program; and

(ii) The application form that the applicant must use.

(2) The amount of funds available for grants and the estimated number and amounts of those grants.

(3) If the Secretary plans to approve multi-year projects, the project period that will be approved.

(4) Any priorities established by the Secretary for the program for that year and the method the Secretary will use to implement the priorities. (See § 75.105 *Annual priorities*.)

(5) Where to find the regulations that apply to the program.

(6) The statutory authority for the program.

(7) The deadlines established under §75.102 (Deadline date for applications.) and 34 CFR 79.8 (How does the Secretary provide States an opportunity to comment on proposed Federal financial assistance?)

(b) If the Secretary either requires or permits preapplications under a program, an application notice for the program explains how an applicant can get the preapplication form.

(c) If a discretionary grant program does not have implementing regulations, the application notice describes:

(1) The purposes of the statute that authorizes the program;

(2) The needs recognized in the authorizing statute;

(3) Other interpretations of the statute adopted by the Secretary that significantly affect the administration of the program;

(4) Inconsistencies, if any, between the authorizing statute and the General Education Provisions Act or the regulations in this part;

(5) How the criteria in § 75.210 of EDGAR apply to an application; and

(6) How the Secretary will distribute the points reserved under § 74.210(c).

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 84059, Dec. 22, 1980; 46 FR 3205, Jan. 14, 1981; 51 FR 20824 June 9, 1986; 51 FR 21164, June 11, 1986]

Cross-reference. See 34 CFR 77.1—definitions of "budget period" and "project period."

§ 75.102 Deadline date for applications.

(a) The application notice for a program sets a deadline date for applications to be mailed or hand delivered to the Department.

(b) If an applicant wants a new grant, the applicant shall:

(1) Mail the application to the address specified in the application notice on or before the deadline date; or

(2) Hand deliver the application to the address specified in the application notice by 4:30 p.m. (Washington, D.C. time) on the deadline date.

(c) [Reserved]

(d) An applicant must show one of the following as proof of mailing:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary.

(e) If an application is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

[45 FR 22497, Apr. 3, 1980, as amended at 51 FR 20824, June 9, 1986]

§ 75.103 Deadline date for preapplications.

(a) If the Secretary invites or requires preapplications under a program, the application notice for the program sets a deadline date for preapplications.

(b) An applicant shall submit its preapplication in accordance with the procedures for applications in § 75.102(b) and (d).

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.104 Applicants must meet procedural rules.

The Secretary may make a grant only to an eligible party that submits an application.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.105 Annual priorities.

(a) *What programs are covered by this section?* This section applies to any program for which the Secretary establishes priorities for selection of applications in a particular fiscal year.

(b) *How does the Secretary establish annual priorities?*

(1) The Secretary establishes final annual priorities by publishing the priorities in a notice in the Federal Register, usually in the application notice for that program.

(2) The Secretary publishes proposed annual priorities for public comment, unless:

(i) The final annual priorities will be implemented only by inviting applications that meet the priorities (Cross-reference: See 34 CFR 75.105(c)(1));

(ii) The final annual priorities are chosen from a list of priorities already established in the program's regulations; or

(iii) Publishing proposed annual priorities would seriously interfere with an orderly, responsible grant award process or would otherwise be impracticable, unnecessary, or contrary to the public interest.

(c) *How does the Secretary implement an annual priority?*

The Secretary may choose one or more of the following methods to implement an annual priority:

(1) *Invitations.* The Secretary may simply invite applications that meet a priority. If the Secetary chooses this method, an application that meets the priority receives no competitive or absolute preference over applications that do not meet the priority.

(2) *Competitive preference.* The Secretary may give one of the following kinds of competitive preference to applications that meet a priority.

(i) If a program uses weighted selection criteria, the Secretary may award selection points to an application that meets the priority. These points are in addition to any points the applicant earns under the selection criteria (see § 75.200(b)). The notice states the number of additional points that the Secretary will award to applications that meet the priority in a particularly effective way.

(ii) The Secretary may select an application that meets a priority over an application of comparable merit that does not meet the priority.

(3) *Absolute preference.* The Secretary may give an absolute preference to applications that meet a priority for a program. The Secretary establishes an absolute preference by reserving all or part of a program's funds solely for applications that meet the priority. The Secretary may establish the amount reserved for applications that meet the priority either:

(i) In the application notice; or

(ii) After determining the number of high quality applications received.

(Authority: 20 U.S.C. 3474)

[46 FR 3205, Jan. 14, 1981]

APPLICATION CONTENTS

CROSS-REFERENCE. See § 75.200 for a description of discretionary and formula grant programs.

§ 75.107 Applications for new grants under a discretionary grant program.

In an application for a new grant under a discretionary grant program, the applicant shall include:

(a) Information that addresses each selection criterion that applies to the program;

(b) The information required by the following sections of EDGAR:

(1) Section 75.110;

(2) Section 75.112;

(3) Section 75.116;

(4) Section 75.117;

(5) The regulations noted after § 75.118, if appropriate; and

(6) Section 75.119, if appropriate; and

(c) All other information that is required under the particular program.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See 34 CFR Part 74, Subpart N—Forms for Applying for Grants.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980 and amended at 53 FR 49143, Dec. 6, 1988]

§ 75.108 Applications for new grants under a formula grant program.

In an application for a new grant under a formula grant program, the applicant shall include:

(a) The information required by the following sections of EDGAR—

(1) Sections 75.110-75.117;

(2) The regulations noted after § 75.118 if appropriate; and

(3) Section 75.119, if appropriate; and

(b) All other information that is required under the particular program.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980 and amended at 53 FR 49143, Dec. 6, 1988]

§ 75.109 Changes to application; number of copies.

(a) Each applicant shall submit an original and two copies of its application to the Department, including any information that the applicant supplies voluntarily.

(b) An applicant may make changes to its application on or before the deadline date for submitting applications under the program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See § 75.200 How applications for new grants are selected for funding.

§ 75.110 Assure compliance with appropriate requirements of law.

An application must include an assurance that a grantee will comply with the requirements imposed by the Secretary concerning:

(a) Special requirements of law;

(b) Program requirements; and

(c) Administrative requirements.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.111 Describe the project.

An application must describe the project in detail. The description must include:

(a) The purpose of the project;

(b) The design of the project and the plan of management for the project;

(c) Each objective of the project and how the applicant plans to use its resources and personnel to achieve each objective;

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27803, July 24, 1987]

§ 75.112 Include a proposed project period and a timeline.

(a) An application must propose a project period for the project.

(b) An application must describe when, in each budget period of the project, the applicant plans to meet each objective of the project.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.113 Describe the key personnel.

An application must include the name and qualifications of each key person in the proposed project. The following information must be included:

(a) The name and qualifications of the project director (if one is to be used.)

(b) The name and qualifications of each of any other key personnel in the project.

(c) The time that each person referred to in paragraphs (a) and (b) of this section plans to commit to the proposed project.

(d) If the name of the project director or any other key person is not known to the applicant when it submits the application, the application must specify the minimum qualifications for that person. This paragraph does not allow an applicant to omit the name or qualifications of the principal investigator for a proposed research project.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.114 Describe the resources.

An application must describe the resources the applicant plans to devote to the project, including:

(a) Facilities; and

(b) Equipment and supplies.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.115 Describe the evaluation plan.

An application must include a description of the applicant's plan to evaluate the project under § 75.590, the authorizing statute of the program, and the implementing regulations of the program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.116 Demonstrate capability; include evaluation of completed project.

(a) An application must include information to demonstrate the applicant's capability to:

(1) Conduct the project; and

(2) Meet the needs of the persons (if any) that the applicant plans to serve with the project.

(b) If an applicant wants a grant for a new project that furthers the objectives of a project already completed by the applicant, the applicant shall include any existing evaluation of the completed project.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.117 Information needed for a multi-year project.

An applicant that proposes a multi-year project shall include in its application:

(a) Information that shows why a multi-year project is needed;

(b) A budget for the first budget period of the project; and

(c) An estimate of the Federal funds needed for each budget period of the project after the first budget period.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.118 Application for a continuation award.

(a) An applicant shall comply with paragraph (b) of this section if:

(1) The applicant wants funds to continue a project already approved on a multi-year basis;

(2) The applicant is about to complete one or more of the budget periods; and

(3) The budget period for which the applicant wants a continuation award is within the approved project period.

(b) An applicant for a continuation award shall submit the following:

(1) A revised face page (standard form 424) and revisions to any other affected pages of the approved application.

(2) A budget that covers the next budget period, and an estimate of the amount of funds that will remain unobligated at the end of the current budget period.

(3) An estimate of the Federal funds needed for each budget period that comes after the next budget period.

(c) The Secretary may also require the applicant to submit a report of project accomplishments to date.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See § 75.117 Information needed for a multi-year project, and §§ 75.250-75.253 Approval of multi-year projects.

NOTE: Other sections in this part may require an applicant to put information in its application. However, these sections are not included here because they either:

(1) Apply only to a limited number of programs; or

(2) Apply only under specified circumstances.

A list of these sections follows:

§ 75.128 Who acts as applicant; the group agreement.
§ 75.141 Certify that open meeting was held.
§ 75.151 When an applicant under § 75.150 must submit its application to the State; proof of submission.
§ 75.156 When an applicant under § 75.155 must submit its application to the State; proof of submission.
§ 75.160 Procedures for State approval of or comment on preapplications.
§ 75.172 Applicant shall show compliance with A-95 procedures.
§ 75.192 Dissemination.
§ 75.601 Applicant's assessment of environmental impact.
§ 75.602 Preservation of historic sites must be described in the application.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980 and amended at 53 FR 49143, Dec. 6, 1988]

§ 75.119 Information needed if private school students participate.

If a program requires the applicant to provide an opportunity for participation of students enrolled in private schools, the application must include the information required of subgrantees under 34 CFR 76.656.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980 and amended at 53 FR 49143, Dec. 6, 1988]

SEPARATE APPLICATIONS—ALTERNATIVE PROGRAMS

§ 75.125 Submit a separate application to each program; exception under the Joint Funding Simplification Act.

An applicant shall submit a separate application to each program under which it wants a grant.

(Authority: 20 U.S.C. 1221e-3(a)(1); 42 U.S.C. 4252(a))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27803, July 24, 1987]

§ 75.126 Application must list all programs to which it is submitted.

If an applicant is submitting an application for the same project under more than one Federal program, the applicant shall list these programs in its application. The Secretary uses this information to avoid duplicate grants for the same project.

(Authority: 20 U.S.C. 1221e-3(a)(1))

GROUP APPLICATIONS

§ 75.127 Eligible parties may apply as a group.

(a) Eligible parties may apply as a group for a grant.

(b) Depending on the program under which a group of eligible parties seeks assistance, the term used to refer to the group may vary. The list that follows contains some of the terms used to identify a group of eligible parties:

(1) Combination of institutions of higher education.

(2) Consortium.

(3) Joint applicants.

(4) Cooperative arrangements.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.128 Who acts as applicant; the group agreement.

(a) If a group of eligible parties applies for a grant, the members of the group shall either:

(1) Designate one member of the group to apply for the grant; or

(2) Establish a separate, eligible legal entity to apply for the grant.

(b) The members of the group shall enter into an agreement that:

(1) Details the activities that each member of the group plans to perform; and

(2) Binds each member of the group to every statement and assurance made by the applicant in the application.

(c) The applicant shall submit the agreement with its application.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.129 Legal responsibilities of each member of the group.

(a) If the Secretary makes a grant to a group of eligible applicants, the applicant for the group is the grantee and is legally responsible for:

(1) The use of all grant funds; and

(2) Ensuring that the project is carried out by the group in accordance with Federal requirements.

(b) Each member of the group is legally responsible to:

(1) Carry out the activities it agrees to perform; and

(2) Use the funds that it receives under the agreement in accordance with Federal requirements that apply to the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

PREAPPLICATIONS

§ 75.130 Preapplications; purpose of §§ 75.131-75.134.

The Secretary considers a preapplication under the procedures in §§ 75.131-75.134.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.131 Consideration of a preapplication.

The Secretary is required to consider a preapplication if:

(a) The applicant complies with the procedural rules that govern submission of the preapplication; and

(b) (1) The preapplication is submitted in response to an application notice that invites or requires preapplications; or

(2) The preapplication is submitted by a government, as defined in 34 CFR 74.3.

CROSS-REFERENCE. See Subpart N of 34 CFR Part 74.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.132 The effect of not submitting a preapplication.

(a) If the Secretary invites but does not require preapplications under a program, an applicant may apply for a grant under the program even if the applicant did not preapply.

(b) If the Secretary requires preapplications under a program and an applicant does not preapply, the applicant may not apply for a grant under the program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.133 Result of a preapplication.

(a) If an applicant submits a preapplication under a program, the Secretary:

(1) Informs the applicant that it is eligible and encourages it to apply for a grant under the program;

(2) Informs the applicant that it is eligible but does not encourage it to apply for a grant under the program; or

(3) Informs the applicant that it is ineligible for assistance under the program, and explains why the applicant is ineligible.

(b) An applicant may apply under a program even if the Secretary does not encourage it to apply.

(Authority. 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See § 75.216 Returning an application to an applicant.

§ 75.134 The basis for the preapplication decision.

To decide whether to encourage a preapplicant to apply, the Secretary uses the same criteria that the Secretary uses to select an applicant for a grant. (See §§ 75.200-75.206 for a description of how selection criteria work.)

(Authority: 20 U.S.C. 1221e-3(a)(1))

STATE APPROVAL PROCEDURES

§ 75.150 Review procedure if State must approve applications; purpose of §§ 75.151-75.153.

If the authorizing statute for a program requires the State to approve each application, the State and the applicant shall use the procedures in §§ 75.151-75.153.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See § 75.160 Procedures for State approval of or comment on preapplications; and § 75.733 Records related to State approval of applications.

§ 75.151 When an applicant under § 75.150 must submit its application to the State; proof of submission.

(a) Each applicant under a program covered by § 75.150 of this part shall submit a copy of its application to the State at least 15 days before the deadline date for submitting the application to the Department.

(b) The applicant shall attach to its application a copy of its letter that requests the State to approve the application.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.152 The State reviews each application.

Each State that receives an application under § 75.151 of this part shall review the application to decide if the State wishes to approve or disapprove the application.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.153 Deadlines for State approval.

(a)(1) The Secretary may publish in the FEDERAL REGISTER a notice that establishes a deadline date for receipt of State approvals of new grant applications under a program covered by § 75.150.

(2) The Secretary may establish a deadline a date for the receipt of State approvals of continuation award applications under a program covered by § 75.150 by:

(i) Notifying each State of the deadline for its approval; or

(ii) Publishing a notice of the deadline in the FEDERAL REGISTER.

(b) If a State approves an application, the appropriate State official shall:

(1) Sign a statement that approves the application; and

(2) Submit the application and the statement by the deadline date for State approvals. The procedures in § 75.102(c) (how to meet a deadline date) apply to this submission.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980, as amended at 51 FR 20824, June 9, 1986]

§ 75.154 Effect of State approval; failure to approve.

(a) If a State approves an application on or before the deadline date for State approval, the Secretary may select that project for a grant.

(b) If a State does not approve an application on or before the deadline date for State approval, the Secretary does not select that project for a grant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

STATE COMMENT PROCEDURES

§ 75.155 Review procedure if State may comment on applications: Purpose of §§ 75.156-75.158.

If the authorizing statute or implementing regulations for a program require that a State be given an opportunity to comment on each application, the State and the applicant shall use the procedures in §§ 75.156-75.158.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.156 When an applicant under § 75.155 must submit its application to the State; proof of submission.

(a) Each applicant under a program covered by § 75.155 shall submit a copy of its application to the State on or before the deadline date for submitting its application to the Department.

(b) The applicant shall attach to its application a copy of its letter that requests the State to comment on the application.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.157 The State reviews each application.

A State that receives an application under § 75.156 may review and comment on the application.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.158 Deadlines for State comments.

(a) The Secretary may establish a deadline date for receipt of State comments on applications.

(b) The State shall make its comments in a written statement signed by an appropriate State official.

(c) The appropriate State official shall submit comments to the Secretary by the deadline date for State comments. The procedures in § 75.102 (b) and (d) (how to meet a deadline) of this part apply to this submission.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.159 Effect of State comments or failure to comment.

(a) The Secretary considers those comments of the State that relate to:

(1) Any selection criterion that applies under the program; or

(2) Any other matter that affects the selection of projects for funding under the program.

(b) If the State fails to comment on an application on or before the deadline date for the appropriate program, the State waives its right to comment.

(c) If the applicant does not give the State an opportunity to comment, the Secretary does not select that project for a grant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.160 Procedures for State approval of or comment on preapplications.

(a) If the authorizing statute for a program requires that a State approve each preapplication, the State and the applicant shall use the approval procedures in §§ 75.151-75.153 for the preapplication.

(b) If the authorizing statute or implementing regulations for a program require that a State be given an opportunity to comment on each preapplication, the State and the applicant shall use the comment procedures in §§ 75.156-75.158 for the preapplication.

(Authority: 20 U.S.C. 1221e-3(a)(1))

DEVELOPMENT OF CURRICULA OR INSTRUCTIONAL MATERIALS

§ 75.190 Consultation.

Each applicant that intends to develop curricula or instructional materials under a grant is encouraged to assure that the curricula or materials will be developed in a manner conducive to dissemination, through continuing consultations with publishers, personnel of State and local educational agencies, teachers, administrators, community representatives, and other individuals experienced in dissemination.

(Authority: 20 U.S.C. 1231c(c)(1))

§ 75.191 Consultation costs.

An applicant may budget reasonable consultation fees or planning costs in connection with the development of curricula or instructional materials.

(Authority: 20 U.S.C. 1231c(c)(2))

§ 75.192 Dissemination.

If an applicant proposes to publish and disseminate curricula or instructional materials under a grant, the applicant shall include an assurance in its application that the curricula or materials will reach the populations for which the curricula or materials were developed.

(Authority: 20 U.S.C. 1231c(c)(3))

Subpart D—How Grants Are Made

SELECTION OF NEW PROJECTS

§ 75.200 How applications for new grants are selected for funding.

(a) *Direct grant programs.* The Department administers two kinds of direct grant programs. A direct grant program is either a discretionary grant or a formula grant program.

(b) *Discretionary grant programs.* (1) A discretionary grant program is one that permits the Secretary to use discretionary judgment in selecting applications for funding.

CROSS-REFERENCE. See § 75.219 Exceptions to the procedures under § 75.217.

(2) The Secretary uses selection criteria to evaluate the applications submitted for new grants under a discretionary grant program.

(3) If a program does not have regulations, the Secretary uses the selection criteria in § 75.210 to select grantees under the program.

(c) *Formula grant programs.* (1) A formula grant program is one that entitles certain applicants to receive grants if they meet the requirements of the program. Applicants do not compete with each other for the funds, and each grant is either for a set amount or for an amount determined under a formula.

(2) The Secretary applies the program statute and regulations to fund projects under a formula grant program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27803, July 24, 1987]

§ 75.201 How to use the selection criteria.

(a) *Unweighted criteria.* If the selection criteria for a program are not weighted, the Secretary evaluates each criterion equally.

(b) *Weighted criteria.* If the selection criteria for a program are weighted, the Secretary assigns in the program regulations a total number of points that an applicant may receive under all of the criteria.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27803, July 24, 1987]

§§ 75.202—75.206 [Reserved]

§ 75.210 Selection criteria for a discretionary grant program that does not have regulations.

(a) *How this section works.* (1) If a discretionary grant program does not have implementing regulations, the Secretary uses the criteria in this section to evaluate applications for new grants under the program.

(2) The maximum score for all of the criteria in this section is 100 points.

(3) Subject to paragraph (c) of this section, the maximum score for each criterion is indicated in parentheses with the criterion.

(b) *The criteria*—(1) *Meeting the purposes of the authorizing statute.* (30 points) The Secretary reviews each application to determine how well the project will meet the purpose of the statute that authorizes the program, including consideration of:

(i) The objectives of the project; and

(ii) How the objectives of the project further the purposes of the authorizing statute.

(2) *Extent of need for the project.* (20 points) The Secretary reviews each application to determine the extent to which the project meets specific needs recognized in the statute that authorizes the program, including consideration of:

(i) The needs addressed by the project;

(ii) How the applicant identified those needs;

(iii) How those needs will be met by the project; and

(iv) The benefits to be gained by meeting those needs.

(3) *Plan of operation.* (15 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including:

(i) The quality of the design of the project;

(ii) The extent to which the plan of management is effective and ensures proper and efficient administration of the project;

(iii) How well the objectives of the project relate to the purpose of the program;

(iv) The quality of the applicant's plan to use its resources and personnel to achieve each objective;

(v) How the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or handicapping condition; and

(vi) For grants under a program that requires the applicant to provide an opportunity for participation of students enrolled in private schools, the quality of the applicant's plan to provide that opportunity.

(4) *Quality of key personnel.* (7 points)

(i) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including:

(A) The qualifications of the project director (if one is to be used);

(B) The qualifications of each of the other key personnel to be used in the project;

(C) The time that each person referred to in paragraphs (b)(4)(i) (A) and (B) of this section will commit to the project; and

(D) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapping condition.

(ii) To determine personnel qualifications under paragraphs (b)(4)(i) (A) and (B) of this section, the Secretary considers:

(A) Experience and training in fields related to the objectives of the project; and

(B) Any other qualifications that pertain to the quality of the project.

(5) *Budget and cost effectiveness.* (5 points) The Secretary reviews each application to determine the extent to which:

(i) The budget is adequate to support the project; and

(ii) Costs are reasonable in relation to the objectives of the project.

(6) *Evaluation plan.* (5 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation:

(i) Are appropriate to the project; and

(ii) To the extent possible, are objective and produce data that are quantifiable.

(Cross-reference: See 34 CFR 75.590 Evaluation by the grantee.)

(7) *Adequacy of resources.* (3 points) The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

(c) *Weighting the criteria.* (15 points) The Secretary distributes an additional 15 points among the criteria listed in paragraph (b) of this section. The Secretary indicates in the application notice for the program how these 15 points are distributed.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

[52 FR 27803, July 24, 1987, as amended at 53 FR 49143, Dec. 6, 1988]

SELECTION PROCEDURES

§ 75.215 How the Department selects a new project: purpose of §§ 75.216-75.222.

Sections 75.216-75.222 describe the process the Secretary [illegible] to select applications for new grants. All of these sections apply to a discretionary grant program. However, only § 75.216 applies also to a formula grant program.

CROSS-REFERENCE. See § 75.200(b) Discretionary grant program, and (e) Formula grant program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.216 Returning an application to the applicant.

(a) The Secretary returns an application to an applicant if:

(1) The applicant is not eligibile.

(2) The applicant does not comply with all of the procedural rules that govern the submission of the application;

(3) The application does not contain the information required under the program; or

(4) The proposed project cannot be funded under the authorizing statute or implementing regulations for the program.

(b) If the Secretary returns an application under this section, the Secretary includes a statement that explains why the application was returned.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.217 How the Secretary selects applications for new grants.

(a) The Secretary selects applications for new grants on the basis of the authorizing statute, the selection criteria, and any priorities or other requirements that have been published in the FEDERAL REGISTER and apply to the selection of those applications.

(b)(1) The Secretary may use experts to evaluate the applications submitted under a program.

(2) These experts may include persons who are not employees of the Federal Government.

(c) The Secretary prepares a rank order of the applications based solely on the evaluation of their quality according to the selection criteria.

(d) The Secretary then determines the order in which applications will be selected for grants. The Secretary considers the following in making these determinations:

(1) The information in each application.

(2) The rank ordering of the applications.

(3) Any other information relevant to a criterion, priority, or other requirement that applies to the selection of applications for new grants, including information concerning the applicant's use of funds under a previous award under the same Federal program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[52 FR 27804, July 24, 1987]

§ 75.218 Applications not selected for funding.

If an application is not selected for funding, the Secretary informs the applicant why the application was not selected.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.219 Exceptions to the procedures under § 75.217.

The Secretary may select an application for funding without following the procedures in § 75.217 if:

(a) The objectives of the project cannot be achieved unless the Secretary makes the grant before the date grants can be made under the procedures in § 75.217; or

(b)(1) The application was evaluated under the preceding competition of the program;

(2) The application rated high enough to deserve selection under § 75.217; and

(3) The application was not selected for funding because the application was mishandled by the Department.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27804, July 24, 1987]

§ 75.220 Procedures the Department uses under § 75.219(a).

If the special circumstances of § 75.219(a) appear to exist for an application, the Secretary uses the following procedures:

(a) The Secretary assembles a board to review the application.

(b) The board consists of:

(1) A program officer of the program under which the applicant wants a grant;

(2) A Department grants officer; and

(3) A Department employee who is not a program officer of the program

but who is qualified to evaluate the application.

(c) The board reviews the application to decide if:

(1) The special circumstances under § 75.219(a) are satisfied;

(2) The application rates high enough, based on the selection criteria, priorities, and other requirements that apply to the program, to deserve selection; and

(3) Selection of the application will not have an adverse impact on the budget of the program.

(d) The board forwards the results of its review to the Secretary.

(e) If each of the conditions in paragraph (c) of this section is satisfied, the Secretary may select the application for funding.

(f) Even if the Secretary does not select the application for funding, the applicant may submit its application under the procedures in Subpart C of this part.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86297, Dec. 30, 1980]

§ 75.222 Procedures the Department uses under § 75.219(b).

If the special circumstances of § 75.219(b) appear to exist for an application, the Secretary may select the application for funding if:

(a) The Secretary has documentary evidence that the special circumstances of § 75.219(b) exist; and

(b) The Secretary has a statement that explains the circumstances of the mishandling.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27804, July 24, 1987]

PROCEDURES TO MAKE A GRANT

§ 75.230 How the Department makes a grant; purpose of §§ 75.231-75.236.

If the Secretary selects an application under §§ 75.217, 75.220, or 75.222, the Secretary follows the procedures in §§ 75.231-75.236 to set the amount and determine the conditions of a grant. Sections 75.235-75.236 also apply to grants under formula grant programs.

CROSS-REFERENCE. See § 75.200 How applications for new grants are selected for funding.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.231 Additional information.

After selecting an application for funding, the Secretary may require the applicant to submit additional information.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.232 The cost analysis; basis for grant amount.

(a) Before the Secretary sets the amount of a grant, the Secretary does a cost analysis of the project. The Secretary:

(1) Verifies the cost data in the detailed budget for the project;

(2) Evaluates specific elements of costs; and

(3) Examines costs to determine if they are necessary, reasonable, and allowable under applicable statutes and regulations.

(b) The Secretary uses the cost analysis as a basis for determining the amount of the grant to the applicant. The cost analysis shows whether the applicant can achieve the objectives of the project with reasonable efficiency and economy under the budget in the application.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.233 Setting the amount of the grant.

The Secretary may fund up to 100 percent of the allowable costs in the budget. In deciding what percent of the allowable costs to fund, the Secretary considers:

(a) Matching or cost sharing requirements that apply; and

(b) Any other financial resources available to the applicant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.234 The conditions of the grant.

The Secretary makes a grant to an applicant only after determining:

(a) The approved costs; and

(b) Any special conditions.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.235 The notification of grant award.

(a) To make a grant, the Secretary issues a notification of grant award and sends it to the grantee.

(b) The notification of grant award sets the amount of the grant and gives other information about the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.236 Effect of the grant.

The grant obligates both the Federal Government and the grantee to the requirements that apply to the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See 34 CFR Part 74, Subpart L—Programmatic Changes and Budget Revisions.

APPROVAL OF MULTI-YEAR PROJECTS

§ 75.250 Project period can be up to 60 months.

The Secretary may approve a project period of up to 60 months.

(Authority: 20 U.S.C. 1221e-3(a)(1); 42 U.S.C. 4252(a))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27804, July 24, 1987]

§ 75.251 The budget period.

(a) The Secretary usually approves a budget period of not more than 12 months, even if the project has a multi-year project period.

(b) If the Secretary approves a multi-year project period, the Secretary:

(1) Makes a grant to the project for the initial budget period; and

(2) Indicates his or her intention to make contination awards to fund the remainder of the project period.

(Authority: 20 U.S.C. 1221e-3(a))

§ 75.253 Continuation of a multi-year project after the first budget period.

(a) The Secretary may make a continuation award for a budget period after the first budget period of an approved multi-year project if:

(1) The Congress has appropriated sufficient funds under the program;

(2) The Secretary is satisfied that the grantee will satisfactorily complete the budget period that is about to end;

(3) The grantee has submitted every report that it must submit before the date of the continuation award; and

(4) Continuation of the project is in the best interest of the Federal Government.

(b) Subject to the criteria in paragraph (a) of this section, in selecting applications for funding under a program the Secretary gives priority to contination awards over new grants.

(c) In determining the amount of a continuation award, the Secretary reduces the amount of funds needed for the next budget period by the amount of funds that remain available from the current budget period.

(d) A grantee that is in the final budget period of a project period may seek continued assistance for the project under the procedures for selecting new projects.

CROSS-REFERENCE. See Subpart C—How to Apply for a Grant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See § 75.117 Information needed for a multi-vear project; and § 75.118 Application for a continuation award.

MISCELLANEOUS

§ 75.260 Allotments and reallotments.

(a) Under some of the programs covered by this part, the Secretary allots funds under a statutory or regulatory formula.

(b) Any reallotment to other grantees will be made by the Secretary in accordance with the authorizing statute for that program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27804, July 24, 1987]

§ 75.261 Extension of a project period.

The Secretary may extend a project period if:

(a) Special or unusual circumstances will delay completion of the project;

(b) The grantee provides the Secretary with a written request for the extension at least 45 days before the end of the project period;

(c) The grantee states the reasons why it needs the extension;

(d) The extension does not violate any statute or regulations;

(e) The extension does not involve the obligation of additional Federal funds; and

(f) The extension is to carry out the activities in the approved application.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980 and amended at 53 FR 49143, Dec. 6, 1988]

Subpart E—What Conditions Must Be Met by a Grantee?

NONDISCRIMINATION

§ 75.500 Federal statutes and regulations on nondiscrimination.

Each grantee shall comply with the following statutes and regulations:

Subject	Statute	Regulations
Discrimination on the basis of race, color or national origin.	Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d through 2000d–4).	34 CFR Part 100.
Discrimination on the basis of sex.	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681–1683).	34 CFR Part 106.
Discrimination on the basis of handicap.	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).	34 CFR Part 104.
Discrimination on the basis of age.	The Age Discrimination Act (42 U.S.C. 6101 *et seq.*).	45 CFR Part 90.

(Authority: 20 U.S.C. 1221e-3(a)(1))

PROJECT STAFF

§ 75.510 Use of a project director.

(a) This section applies to each grantee that uses a project director to administer its project.

(b) The grantee shall insure that its project director has:

(1) Appropriate professional qualifications, experience, and administrative skills, and

(2) A clear commitment to the objectives of the project.

(c) The grantee shall give its project director sufficient authority to conduct the project effectively.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.511 Waiver of requirement for a full-time project director.

(a) If regulations under a program require a full-time project director, the Secretary may waive that requirement under the following conditions:

(1) The project will not be adversely affected by the waiver.

(2) (i) The project director is needed to coordinate two or more related projects; or

(ii) The project director must teach a minimum number of hours to retain faculty status.

(b) The waiver either permits the grantee:

(1) To use a part-time project director; or

(2) Not to use any project director.

(c) (1) An applicant or a grantee may request the waiver.

(2) The request must be in writing and must demonstrate that a waiver is appropriate under this section.

(3) The Secretary gives the waiver in writing. The waiver is effective on the date the Secretary signs the waiver.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See 34 CFR 74.103(c) Changes in key people in a research project.

§ 75.515 Use of consultants.

(a) Subject to Federal statutes and regulations, a grantee shall use its general policies and practices when it hires, uses, and pays a consultant as part of the project staff.

(b) The grantee may not use its grant to pay a consultant unless:

(1) There is a need in the project for the services of that consultant; and

(2) The grantee cannot meet that need by using an employee rather than a consultant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.516 Compensation of consultants—employees of institutions of higher education.

If an institution of higher education receives a grant for research or for educational services, it may pay a consultant's fee to one of its employees only in unusual circumstances and only if:

(a) The work performed by the consultant is in addition to his or her regular departmental load; and

(b) (1) The consultation is across departmental lines; or

(2) The consultation involves a separate or remote operation.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.517 Changes in key staff members.

A grantee shall comply with 34 CFR 74.103(c)(2) concerning replacement or lesser involvement of any key project staff, whether or not the grant is for research.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.518 Minimum wage rates.

The grantee shall pay a project staff member not less than any minimum wage required under Federal Law.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.519 Dual compensation of staff.

A grantee may not use its grantee to pay a project staff member for time or work for which that staff member is compensated from some other source of funds.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CONFLICT OF INTEREST

§ 75.524 Conflict of interest: Purpose of § 75.525.

(a) The conflict of interest regulations of the Department that apply to a grant are in § 75.525.

(b) These conflict of interest regulations do not apply to a "government" as defined in 34 CFR 74.3.

NOTE: A government must provide a conflict of interest assurance under the standard application required by Subpart N of 34 CFR Part 74 (Forms for Applying for Grants).

(c) The regulations in § 75.525 do not apply to a grantee's procurement contracts. The conflict of interest regulations that cover those procurement contracts are in 34 CFR Part 74.

§ 75.525 Conflict of interest: Participation in a project.

(a) A grantee may not permit a person to participate in an administrative decision regarding a project if:

(1) The decision is likely to benefit that person or a member of his or her immediate family; and

(2) The person:

(i) Is a public official; or

(ii) Has a family or business relationship with the grantee.

(b) A grantee may not permit any person participating in the project to use his or her position for a purpose that is—or gives the appearance of being—motivated by a desire for a private financial gain for that person or for others.

(Authority: 20 U.S.C. 1221e-3(a)(1))

ALLOWABLE COSTS

§ 75.530 General cost principles.

The general principles to be used in determining costs applicable to grants and cost-type contracts under grants are referenced in Subpart Q of 34 CFR Part 74 (Cost Principles).

(Authority: 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See 34 CFR Part 74, Subpart G—Matching or Cost Sharing.

§ 75.531 Limit on total cost of a project.

A grantee shall insure that the total cost to the Federal Government is not more than the amount stated in the notification of grant award.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.532 Use of funds for religion prohibited.

(a) No grantee may use its grant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of those activities.

(3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of those activities.

(4) An activity of a school or department of divinity.

(b) As used in this section, "school or department of divinity" means an institution or a component of an institution whose program is specifically for the education of students to:

(1) Prepare them to enter into a religious vocation; or

(2) Prepare them to teach theological subjects.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.533 Acquisition of real property; construction.

No grantee may use its grant for acquisition of real property or for construction unless specifically permitted by the authorizing statute or implementing regulations for the program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.534 Training grants—automatic increases for additional dependents.

The Secretary increases an educational training grant to cover the cost of additional dependents not specified in the notification of grant award if:

(a) Allowances for those dependents are authorized by the program statute and are allowable under the grant; and

(b) Appropriations are available to cover the cost.

(Authority: 20 U.S.C. 1221e-3(a)(1))

INDIRECT COST RATES

§ 75.560 General indirect cost rates; exceptions.

(a) Appendices C-F to 34 CFR Part 74 describe the differences between direct and indirect costs and include the principles for determining the general indirect cost rate that a grantee may use for grants under most programs.

(b) Sections 75.562-75.568 provide restrictions on indirect cost rates under certain programs.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.561 Approval of indirect cost rates.

(a) The Secretary approves an indirect cost rate for a grantee other than a local educational agency. For the purposes of this section, the term "local educational agency" does not include a State agency.

(b) Each State educational agency, on the basis of a plan approved by the Secretary, shall approve an indirect cost rate for each local educational agency that requests it to do so.

(c) Each indirect cost rate must be approved annually.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.562 Indirect cost rates for educational training projects.

(a) The Secretary may approve an indirect cost rate for an educational training project at the lesser of:

(1) The actual indirect cost rate of the grantee; or

(2) Eight percent of the total direct costs of the project.

(b) This section does not apply to:

(1) A State (as defined in 34 CFR 74.3); or

(2) A local government (as defined in 34 CFR 74.3).

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.563 Restricted indirect cost rate—programs covered.

Sections 75.564-75.568 apply to each program that has a statutory requirement not to use Federal funds to supplant non-Federal funds. These programs include the following:

Program	Authorizing statute
Bilingual Education	Title VII-A of the Elementary and Secondary Education Act.
Consumer Education Program.	Title III-E of the Elementary and Secondary Education Act.
Environmental Education Program.	Title III-H of the Elementary and Secondary Education Act.
Safe Schools	Title IX-D of the Elementary and Secondary Education Act.
Follow Through Program	Sections 551-556 of the Economic Opportunity Act of 1964.
National Alcohol and Drug Abuse Prevention Program.	Public Law 93-422.
Indian Education Act (Part A)	Title IV-A of Public Law 92-318.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.564 Restricted indirect cost rate—formula.

(a) An indirect cost rate for a grant under a program covered by § 75.563 is determined by the following formula:

Indirect cost rate = (Administrative charge + Fixed charges) ÷ (Other expenditures)

(b) Administrative charges, fixed charges, and other expenditures must be determined under §§ 75.565-75.567.

(c) Under the programs covered by § 75.563, a grantee other than a State or a local government (as those terms are defined in 34 CFR 74.3) may use:

(1) An indirect cost rate computed under paragraph (a) of this section; or

(2) An indirect cost rate of eight percent unless the Secretary determines that the grantee would have a lower rate under paragraph (a) of this section.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.565 Administrative charge.

(a) As used in § 75.564, "administrative charge" means the cost of an activity that is for the direction and control of the grantee's affairs that are organization-wide. An activity is not organization-wide if it is limited to one activity, one component of the grantee, one subject, one phase of operations, or other single responsibility.

(b) The term includes the cost of performing a service function, such as accounting, payroll preparation, or personnel management, that is normally at the grantee's level even if the function is physically located elsewhere for convenience or better management.

(c) The term does not include expenditures for:

(1) The governing body of the grantee;

(2) Compensation of the chief administrative officer of the grantee;

(3) Compensation of the chief administrative officer of any component of the grantee; and

(4) Operation of the immediate offices of these officers.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.566 Fixed charges.

As used in § 75.564, "fixed charges" means contributions of the grantee to:

(a) Retirement, including State, county, or local retirement funds, Social Security, and pension payments;

(b) Unemployment compensation payments;

(c) Property, employee, health, and liability insurance; and

(d) All similar costs normally considered to be employee fringe benefits.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.567 Other expenditures.

(a) As used in § 75.564, "other expenditures" means the grantee's total expenditures for its federally- and non-federally-funded activities in the most recent year for which data are available.

(b) The term does not include:

(1) Administrative charges determined under § 75.565;

(2) Fixed charges determined under § 75.566;

(3) Capital outlay;

(4) Debt service;

(5) Fines and penalties;

(6) Contingencies; and

(7) Election expenses. However, the term does include election expenses that result from elections required by a program statute.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.568 Using the restricted indirect cost rate.

(a) Under the programs referenced in § 75.563, the maximum amount of indirect costs under a grant is determined by the following formula:

Indirect costs = (Indirect cost rate) × (Total direct costs of the grant minus any costs for capital outlay, debt service, or election expenses unless the election is required by a program statute)

(b) If a grantee uses an indirect cost rate, the administrative and fixed charges covered by that rate must be excluded by the grantee from the direct costs it charges to the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

COORDINATION

§ 75.580 Coordination with other activities.

(a) A grantee shall, to the extent possible, coordinate its project with other activities that are in the same geographic area served by the project and that serve similar purposes and target groups.

(b) A grantee whose project includes activities to improve the basic skills of children, youth, or adults shall, to the extent possible, coordinate its project with other basic skills activities that are in the same geographic area served by the project.

(c) For the purposes of this section, "basic skills" means reading, mathematics, and effective communication, both written and oral.

(d) The grantee shall continue its coordination during the project period.

(Authority: 20 U.S.C. 1221e-3(a)(1); 2890)

§ 75.581 Methods of coordination.

Depending on the objectives and requirements of its project, a grantee shall use one or more of the following methods of coordination:

(a) Planning the project with organizations and individuals who have similar objectives or concerns.

(b) Sharing information, facilities, staff, services, or other resources.

(c) Engaging in joint activities such as instruction, needs assessment, evaluation, monitoring, and technical assistance or staff training.

(d) Using the grant funds so as not to duplicate or counteract the effects of funds made available under other programs.

(e) Using the grant funds to increase the impact of funds made available under other programs.

(Authority: 20 U.S.C. 1221e-3(a)(1))

EVALUATION

§ 75.590 Evaluation by the grantee.

A grantee shall evaluate at least annually:

(a) The grantee's progress in achieving the objectives in its approved application;

(b) The effectiveness of the project in meeting the purposes of the program; and

(c) The effect of the project on persons being served by the project, including:

(1) Any persons who are members of groups that have been traditionally underrepresented, such as:

(i) Members of racial or ethnic minority groups;

(ii) Women;

(iii) Handicapped persons; and

(iv) The elderly; and

(2) If the program statute requires that private school students be provided an opportunity to participate, the students who are enrolled in private schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.591 Federal evaluation—cooperation by a grantee.

A grantee shall cooperate in any evaluation of the program by the Secretary.

(Authority: 20 U.S.C. 1226c, 1231a)

[45 FR 86297, Dec. 30, 1980]

§ 75.592 Federal evaluation—satisfying requirement for grantee evaluation.

If a grantee cooperates in a Federal evaluation of a program, the Secretary may determine that the grantee meets the evaluation requirements of the program, including § 75.590.

(Authority: 20 U.S.C. 1226c, 1231a)

CONSTRUCTION

CROSS-REFERENCE. See 34 CFR Part 74, Subpart P—Procurement Standards.

§ 75.600 Use of a grant for construction: purpose of §§ 75.601–75.615.

Sections 75.601–75.615 apply to:

(a) An applicant that requests funds for construction; and

(b) A grantee whose grant includes funds for construction.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.601 Applicant's assessment of environmental impact.

An applicant shall include with its application its assessment of the impact of the proposed construction on the quality of the environment in accordance with Section 102(2)(C) of the National Environmental Policy Act of 1969 and Executive Order 11514 (34 FR 4247).

(Authority: 42 U.S.C. 4332(2)(C))

§ 75.602 Preservation of historic sites must be described in the application.

(a) An applicant shall describe in its application the relationship of the proposed construction to and probable effect on any district, site, building, structure, or object that is:

(1) Included in the National Register of Historic Places; or

(2) Eligible under criteria established by the Secretary of Interior for

inclusion in the National Register of Historic Places.

CROSS-REFERENCE. See 36 CFR Part 60 for these criteria.

(b) In deciding whether to make a grant, the Secretary considers:

(1) The information provided by the applicant under paragraph (a) of this section; and

(2) Any comments by the Advisory Council on Historic Preservation.

CROSS-REFERENCE. See 36 CFR Part 800, which provides for comments from the Council.

(Authority: 16 U.S.C. 470f)

§ 75.603 Grantee's title to site.

A grantee must have or obtain a full title or other interest in the site, including right of access, that is sufficient to insure the grantee's undisturbed use and possession of the facilities for 50 years or the useful life of the facilities, whichever is longer.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.604 Availability of cost-sharing funds.

A grantee shall ensure that sufficient funds are available to meet any non-Federal share of the cost of constructing the facility.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.605 Beginning the construction.

(a) A grantee shall begin work on construction within a reasonable time after the grant for the construction is made.

(b) Before construction is advertised or placed on the market for bidding, the grantee shall get approval by the Secretary of the final working drawings and specifications.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.606 Completing the construction.

(a) A grantee shall complete its construction within a reasonable time.

(b) The grantee shall complete the construction in accordance with the application and approved drawings and specifications.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.607 General considerations in designing facilities and carrying out construction.

(a) A grantee shall insure that the construction is:

(1) Functional;

(2) Economical; and

(3) Not elaborate in design or extravagant in the use of materials, compared with facilities of a similar type constructed in the State or other applicable geographic area.

(b) The grantee shall, in developing plans for the facilities, consider excellence of architecture and design and inclusion of works of art. The grantee may not spend more than one percent of the cost of the project on inclusion of works of art.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.608 Areas in the facilities for cultural activities.

A grantee shall make reasonable provision, consistent with the other uses to be made of the facilities, for areas in the facilities that are adaptable for artistic and other cultural activities.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.609 Comply with safety and health standards.

In planning for and designing facilities, a grantee shall observe:

(a) The standards under the Occupational Safety and Health Act of 1970 (Pub. L. 91-576) (See 36 CFR Part 1910); and

(b) State and local codes, to the extent that they are more stringent.

(Authority: 29 U.S.C. 651)

§ 75.610 Access by the handicapped.

A grantee shall comply with the Federal regulations on access by the handicapped that apply to construction and alteration of facilities. These regulations are:

(a) For residential facilities—24 CFR Part 40; and

(b) For non-residential facilities—41 CFR Subpart 101-19.6.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.611 Avoidance of flood hazards.

In planning the construction, a grantee shall, in accordance with the provisions of Executive Order 11988 of February 10, 1978 (43 FR 6030) and rules and regulations that may be issued by the Secretary to carry out those provisions:

(a) Evaluate flood hazards in connection with the construction; and

(b) As far as practicable, avoid uneconomic, hazardous, or unnecessary use of flood plains in connection with the construction.

(Authority: Executive Order 11296)

§ 75.612 Supervision and inspection by the grantee.

A grantee shall maintain competent architectural engineering supervision and inspection at the construction site to insure that the work conforms to the approved drawings and specifications.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.613 Relocation assistance by the grantee.

A grantee is subject to the regulations on relocation assistance and real property acquisition in 34 CFR Part 15.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.614 Grantee must have operational funds.

A grantee shall insure that, when construction is completed, sufficient funds will be available for effective operation and maintenance of the facilities.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.615 Operation and maintenance by the grantee.

A grantee shall operate and maintain the facilities in accordance with applicable Federal, State, and local requirements.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.616 Energy conservation.

(a) To the extent feasible, the grantee shall design and construct facilities to maximize the efficient use of energy and to minimize the use of petroleum and natural gas as energy sources.

(b) Standard 90-75 of the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) is incorporated by reference in this section.

NOTE: Incorporation by reference provisions approved by the Director of the Federal Register on August 25, 1980. Incorporated document is on file at the FEDERAL REGISTER.

Copies of ASHRAE 90-75 may be obtained from the Publication Sales Department, American Society of Heating, Refrigerating, and Air-Conditioning Engineers, Inc., 345 East 47th Street, New York, New York 10017.

(c) A grantee shall comply with ASHRAE Standard 90-75 in designing and constructing facilities built with project funds.

(Authority: 42 U.S.C. 8373(b); E.O. No. 12185)

[45 FR 58013, Aug. 29, 1980]

EQUIPMENT AND SUPPLIES

CROSS-REFERENCE. See 34 CFR Part 74, Subpart O—Property.

§ 75.618 Charges for use of equipment or supplies.

A grantee may not charge students or school personnel for the ordinary use of equipment or supplies purchased with grant funds.

(Authority: 20 U.S.C. 1221e-3(a)(1))

PUBLICATIONS AND COPYRIGHTS

§ 75.620 General conditions on publication.

(a) *Content of materials.* Subject to any specific requirements that apply to its grant, a grantee may decide the format and content of project materials that it publishes or arranges to have published.

(b) *Required Statement.* The grantee shall ensure that any publication that contains project materials also contains the following statements:

"The contents of this (insert type of publication; e.g., book, report, film) were developed under a grant from the Department of Education. However, those contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government."

(Authority: 20 U.S.C. 1221e-3(a)(1); 20 U.S.C. 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86297, Dec. 30, 1980]

§ 75.621 Copyright policy for grantees.

A grantee may copyright project materials in accordance with 34 CFR Part 74.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 19118, May 26, 1988]

Cross-reference. See 34 CFR Part 74, Subpart F—Grant-Related Income; and 34 CFR 74.145 Copyrights.

§ 75.622 Definition of "project materials."

As used in §§ 75.620–75.621, "project materials" means a copy-rightable work developed with funds from a grant or contract of the Department.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Inventions and Patents

Cross-reference. See 34 CFR Part 74.44 Inventions and Patents.

§ 75.625 Invention and patent policy.

Grantees and contractors are subject to the ED policy in 34 CFR Parts 6 and 8 regarding inventions and patents.

§ 75.626 Show Federal support; give papers to vest title.

(a) Any patent application filed by a grantee for an invention made under a grant must include the following statement in the first paragraph:

"The invention described in this application was made under a grant from the Department of Education."

(b) On request, the grantee shall furnish ED with executed instruments prepared by the Federal Government, and other papers that may be necessary, to vest in the Federal Government the rights reserved in accordance with a determination made under 34 CFR Part 8. These instruments and papers enable the Government to apply for and prosecute a patent application, in any country, to cover each invention for which the Federal Government has the right to file an application.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86297, Dec. 30, 1980]

Other Requirements for Certain Projects

Cross-reference. See 34 CFR Part 74, Subpart C—Bonding and Insurance.

§ 75.650 Participation of students enrolled in private schools.

If the authorizing statute for a program requires a grantee to provide for participation by students enrolled in private schools, the grantee shall provide a genuine opportunity for equitable participation in accordance with the requirements that apply to subgrantees under 34 CFR 76.650–76.662.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.681 Protection of human research subjects.

If a grantee uses a human subject in a research project, the grantee shall protect the person from physical, psychological, or social injury resulting from the project.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Cross-reference. See 45 CFR Part 46—Protection of Human Research Subjects.

§ 75.682 Treatment of animals.

If a grantee uses an animal in a project, the grantee shall provide the animal with proper care and humane treatment in accordance with the Animal Welfare Act of 1970.

(Authority: Pub. L. 89-544, as amended)

§ 75.683 Health or safety standards for facilities.

A grantee shall comply with any Federal health or safety requirements that apply to the facilities that the grantee uses for the project.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.684 Day care services.

(a) If a grantee uses program funds to provide day care services, the grantee shall comply with the requirements in 45 CFR Part 71.

(b) The Secretary may waive this requirement by publication of a notice in the FEDERAL REGISTER.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.690 Energy conservation awareness.

To the extent that it is consistent with the statute and regulations for any program, the grantee shall consider incorporating into its program a component on energy awareness. This component may include study of the problems, solutions, and alternatives relating to the Nation's energy crisis.

(Authority: 42 U.S.C. 8373(b); E.O. No. 12185)

[45 FR 58013, Aug 29, 1980. Redesignated at 45 FR 77368; Nov 21, 1980]

Subpart F—What Are the Administrative Responsibilities of a Grantee?

GENERAL ADMINISTRATIVE RESPONSIBILITIES

§ 75.700 Compliance with statutes, regulations, and applications.

A grantee shall comply with applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, and applications.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.701 The grantee administers or supervises the project.

A grantee shall directly administer or supervise the administration of the project.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.702 Fiscal control and fund accounting procedures.

A grantee shall use fiscal control and fund accounting procedures that insure proper disbursement of and accounting for Federal funds.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See 34 CFR Part 74, Subpart B—Cash Depositories, Subpart H—Standards for Grantee and Subgrantee Financial Management Systems, and Subpart K—Grant and Subgrant Payment Requirements.

§ 75.703 Obligation of funds during the grant period.

A grantee may use grant funds only for obligations it makes during the grant period.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.707 When obligations are made.

The following table shows when a grantee makes obligations for various kinds of property and services.

If the obligation is for—	The obligation is made—
(a) Acquisition of real or personal property.	On the date the grante makes a binding writ commitment to acquire th property.
(b) Personal services by an employee of the grantee.	When the services are per formed.
(c) Personnal services by a contractor who is not an employee of the grantee.	On the date on which th grantee makes a bindi written commitment t obtain the services.
(d) Performance of work other than personal services.	On the date on which th grantee makes a bindi written commitment t obtain the work.
(e) Public utility services	When the grantee receive the services.
(f) Travel	When the travel is taken.
(g) Rental of real or personal property.	When the grantee uses th property.
(h) A preagreement cost that was properly approved by the Secretary under the cost principles in appendices C–F to 45 CFR Part 74.	On the first day of the gra period.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.708 Prohibition of subgrants.

(a) A grantee may not make a subgrant under a program covered by this part unless specifically authorized by statute.

(b) A grantee may contract for supplies, equipment, construction, and other services, in accordance with 34 CFR Part 74, Subpart P—Procurement Standards.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27804, July 24, 1987]

REPORTS

CROSS-REFERENCE. See 34 CFR Part 74, Subpart I—Financial Reporting Requirements, and Subpart J—Monitoring and Reporting of Program Performance.

§ 75.720 Financial and performance reports.

(a) This section applies to the reports required under 34 CFR Part 74, Subpart I (financial reporting) and Subpart J (performance reporting).

(b) A grantee shall submit these reports annually, unless the Secretary allows less frequent reporting. However, the Secretary may require a grantee of the National Institute of Education to submit performance reports more often than annually.

(c) The Secretary may, under 34 CFR 74.7 (Special grant or subgrant conditions) or 34 CFR 74.72(e) (Grantee accounting systems), require a grantee to report more frequently than annually.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86297, Dec. 30, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

RECORDS

CROSS-REFERENCE. See 34 CFR Part 74, Subpart D—Retention and Access Requirements for Records.

§ 75.730 Records related to grant funds.

A grantee shall keep records that fully show:

(a) The amount of funds under the grant;

(b) How the grantee uses the funds;

(c) The total cost of the project;

(d) The share of that cost provided from other sources; and

(e) Other records to facilitate an effective audit.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1232f)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980 and amended at 53 FR 49143, Dec. 6, 1988]

§ 75.731 Records related to compliance.

A grantee shall keep records to show its compliance with program requirements.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.732 Records related to performance.

(a) A grantee shall keep records of significant project experiences and results.

(b) The grantee shall use the records under paragraph (a) to:

(1) Determine progress in accomplishing project objectives; and

(2) Revise those objectives, if necessary.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See 34 CFR 74.103 (b) and (c)—Procedures for revising objectives.

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980 and amended at 53 FR 49143, Dec. 6, 1988]

§ 75.733 [Reserved]

§ 75.734 Record retention period.

Unless a longer period is required under 34 CFR Part 74, a grantee shall retain records for five years after the completion of the activity for which it uses grant funds.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1232f(a))

[45 FR 22497, Apr. 3, 1980. Redesignated at 34 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980]

CROSS-REFERENCE. See 34 CFR Part 74.21—Length of retention period; and 74.22 Starting date of retention period.

PRIVACY

§ 75.740 Protection of and access to student records.

Most records on present or past students are subject to the requirements of Section 438 of GEPA and its implementing regulations in 34 CFR Part 99. (Section 438 is the Family Educational Rights and Privacy Act of 1974.)

(Authority: 20 U.S.C. 1231(g))

DATA COLLECTION BY A GRANTEE

§ 75.750 Approval of data collection instruments.

(a) The Department is the sponsor of the data collection activity of a grantee in any of the following circumstances:

(1) The grantee represents to respondents that the data is being collected for or in association with the Department. This does not include acknowledgment of the assistance the grantee received under the grant.

(2) The grantee uses the data collection instrument tc collect data that the Department has requested for the planning, operation, or evaluation of an Education Department Federal program.

(3) The grant provides for Department approval of the survey design, content of the instrument, or data collection procedures.

(4) The grant provides for:

(i) The grantee to submit data on individual respondents; or

(ii) The grantee to prepare and submit tabulations of the data requested by the Department.

(b) If the Education Divison sponsors a data collection activity of a grantee, the data collection instruments to be used by the grantee are subject to review under either:

(1) The paperwork control requirements of Section 400A of GEPA (the Federal Education Data Acquisition Council (FEDAC) procedures); or

(2) The requirements under OMB Circular A-40.

(c) The FEDAC procedures apply to a data collection activity sponsored by the Department if:

(1) The respondents are primarily educational agencies or institutions; and

(2) The purpose of the activity is to get information needed for:

(i) The management of Federal educational programs;

(ii) The development of policy related to those programs; or

(iii) Research or evaluation studies related to the implementation of those programs.

(Authority: 20 U.S.C. 1221-3; 1221e-3(a)(1))

CROSS-REFERENCE. See the FEDAC procedures published in the FEDERAL REGISTER on August 8, 1979 (44 FR 46535).

§ 75.751 Procedures if approval is required.

If approval of a data collection instrument is required under the FEDAC procedures or under OMB Circular A-40, the grantee shall submit an original and four copies of each of the following to the Secretary:

(a) The proposed data collection instrument.

(b) A completed OMB Standard Form 83.

(c) The supporting statement required in the "Instructions for Requesting OMB Approval under the Federal Reports Act," as described in standard form 83A.

(d) Supplementary information required by FEDAC under the procedures published in the FEDERAL REGISTER on August 8, 1979 (44 FR 46535).

(Authority: 20 U.S.C. 1221-3; 1221e-3(a)(1))

§ 75.752 Responsibility for data collection.

Unless FEDAC or the OMB approves a data collection instrument, the grantee may not in any way represent or imply that the data is being collected by or for the Federal Government. This does not preclude the grantee from acknowledging the assistance it received under the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.753 Confidentiality of response.

In using data collection instruments, a grantee shall provide for anonymity and confidentiality of responses from individuals.

(Authority: 20 U.S.C. 1221-3; 1221e-3(a)(1))

§ 75.754 Exemption from coverage.

The regulations in §§ 75.750-75.753 do not apply to data collection instruments that are solely:

(a) Tests or examinations to determine knowledge, ability, or aptitude of individuals; or

(b) Instruments to collect data for identification or classification in connection with those tests or examinations.

(Authority: 20 U.S.C. 1221-3; 1221e-3(a)(1))

§ 75.755 Definitions used in §§ 75.750-75.754.

As used in §§ 75.750-75.754:

Data collection instrument means a report form, application form, schedule, questionnaire, or similar instrument for getting answers to identical questions from ten or more respondents.

Respondent is an individual or organization from whom a grantee collects information either directly or indirectly.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Subpart G—What Procedures Does the Department Use To Get Compliance?

CROSS-REFERENCE. See 34 CFR Part 74, Subpart M—Grant and Subgrant Closeout, Suspension, and Termination.

§ 75.900 Waiver of regulations prohibited.

(a) No official, agent, or employee of ED may waive any regulation that applies to a Department program, unless the regulation specifically provides that it may be waived.

(b) No act or failure to act by an official, agent, or employee of ED can affect the authority of the Secretary to enforce regulations.

(Authority: 43 Dec. Comp. Gen. 31 (1963))

§ 75.901 Suspension and termination.

(a) [Reserved]

(b) The Secretary may use the Education Appeal Board to resolve disputes that are not subject to other procedures. Cross-reference: See the following sections in Part 74:

(1) Section 74.113 (Violation of terms).

(2) Section 74.114 (Suspension).

(3) Section 74.115 (Termination).

(4) The last sentence of § 74.73(c) (Financial reporting after a termination).

(5) Section 74.112 (Amounts payable to the Federal Government).

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 86297, Dec. 30, 1980]

§ 75.902 [Reserved]

§ 75.903 Effective date of termination.

Termination is effective on the latest of:

(a) The date of delivery to the grantee of the notice of termination;

(b) The termination date given in the notice of termination; or

(c) The date of a final decision of the Secretary under Part 78 of this title.

(Authority: 20 U.S.C. 1221e-3(a)(1); 20 U.S.C. 3474)

[45 FR 22497, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86298, Dec. 30, 1980]

§ 75.910 Cooperation with audits.

A grantee shall cooperate with the Secretary and the Comptroller General of the United States or any of their authorized representatives in the conduct of audits authorized by Federal law. This cooperation includes access without unreasonable restrictions to records and personnel of the grantee for the purpose of obtaining relevant information.

(Authority: 5 U.S.C. Appendix 3, Sections 4(a)(1), 4(b)(1)(A), and 6(a)(1); 20 U.S.C. 1221e-3(a)(1), 1232f)

[54 FR 21775, May 19, 1989]

PART 76—STATE-ADMINISTERED PROGRAMS

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Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474, unless otherwise noted.

Source: 45 FR 22517, Apr. 3, 1980, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980.

Subpart A—General

REGULATIONS THAT APPLY TO STATE-ADMINISTERED PROGRAMS

§ 76.1 Programs to which Part 76 applies.

(a) The regulations in Part 76 apply to each State-administered program of the Department.

(b) If a State formula grant program does not have implementing regulations, the Secretary implements the program under the authorizing statute and, to the extent consistent with the authorizing statute, under the General Education Provisions Act and the regulations in this part. For the purposes of this part, the term "State formula grant program" means a program whose authorizing statute or implementing regulations provide a formula for allocating program funds among eligible States.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 84059, Dec. 22, 1980; 47 FR 52354, Nov. 19, 1982; 50 FR 29330, July 18, 1985; 50 FR 32564, Aug. 13, 1985; 50 FR 43545, Oct. 25, 1985; 51 FR 35583, Oct. 6, 1986; 52 FR 27804, July 24, 1987; 54 FR 21776, May 19, 1989; 55 FR 14816, Apr. 18, 1990]

§ 76.2 Exceptions in program regulations to Part 76.

If a program has regulations that are not consistent with Part 76, the implementing regulations for that program identify the sections of Part 76 that do not apply.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 54 FR 21776, May 19, 1989]

§ 76.3 ED general grant regulations apply to these programs.

The ED general grant regulations in 34 CFR Part 74 apply to the programs covered by this part. To find subjects covered under 34 CFR Part 74, look in the table of contents at the beginning of 34 CFR Part 74.

(Authority: 20 U.S.C. 1221e-3(a)(1))

ELIGIBILITY FOR A GRANT OR SUBGRANT

§ 76.50 Statutes determine eligibility and whether subgrants are made.

(a) Under a program covered by this part, the Secretary makes a grant:

(1) To the State agency designated by the authorizing statute for the program; or

(2) To the State agency designated by the State in accordance with the authorizing statute.

(b) The authorizing statute determines the extent to which a State may:

(1) Use grant funds directly; and

(2) Make subgrants to eligible applicants.

(c) The regulations in Part 76 on subgrants apply to a program only if subgrants are authorized under that program.

(d) The authorizing statute determines the eligibility of an applicant for a subgrant.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27804, July 24, 1987; 54 FR 21776, May 19, 1989]

§ 76.51 A State distributes funds by formula or competition.

If a program statute authorizes a State to make subgrants, the statute:

(a) Requires the State to use a formula to distribute funds;

(b) Gives the State discretion to select subgrantees through a competition among the applicants or through some other procedure; or

(c) Allows some combination of these procedures.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 54 FR 21776, May 19, 1989]

Subpart B—How a State Applies for a Grant

STATE PLANS AND APPLICATIONS

§ 76.100 Effect of this subpart.

This subpart establishes general requirements that a State must meet to apply for a grant under a program covered by this part. Additional requirements are in the authorizing statute and the implementing regulations for the program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[52 FR 27804, July 24, 1987]

§ 76.101 The general State application.

A State that makes subgrants to local educational agencies under a program subject to this part shall have on file with the Secretary a general application that meets the requirements of Section 435 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232d)

[52 FR 27804, July 24, 1987]

§ 76.102 Definition of "State plan" for Part 76.

As used in this part, "State plan" means any of the following documents:

(a) *Compensatory education.* The application under Section 162 of Title I of the Elementary and Secondary Education Act.

(b) *Migrant children.* The application under Sections 141-143 of the Elementary and Secondary Education Act.

(c) *Basic skills.* The agreement under Title II-B of the Elementary and Secondary Education Act.

(d) *Library resources.* The State plan under Title II of the Elementary and Secondary Education Act (as in effect on Sept. 30, 1978).

(e) *Innovative projects; Guidance and Counseling.* The State plan under Title III of the Elementary and Secondary Education Act (as in effect on Sept. 30, 1978).

(f) *Educational Improvement, Resources, and Support.* The State plan under Title IV of the Elementary and Secondary Education Act.

(g) *State educational agencies.* The State plan under Title V-B of the Elementary and Secondary Education Act.

(h) *State educational agencies.* The application under Title V-A of the Elementary and Secondary Education Act (as in effect September 30, 1978).

(i) *Community schools.* The State plan under Title VIII of the Elementary and Secondary Education Act.

(j) *Gifted and talented children.* The application under Section 904(b)(1) of Title IX of the Elementary and Secondary Education Act.

(k) *Academic subjects.* The State plan under Title III-A of the National Defense Education Act.

(l) *Handicapped children.* The State plan under Part B of the Education of the Handicapped Act.

(m) *Handicapped children.* The application under Section 619 of the Education of the Handicapped Act.

(n) *Vocational education.* The annual program plan and the annual accountability report under Part A of Title I of the Vocational Education Act.

(o) *Career education.* The State plan under Section 7 of the Career Education Incentive Act.

(p) *Adult education.* The State plan under the Adult Education Act.

(q) *Community services.* The State plan under Title I of the Higher Education Act.

(r) *State student incentive grants.* The application under Section 415C of the Higher Education Act.

(s) *Educational information centers.* The State plan under Section 418B of the Higher Education Act.

(t) *Incentive grants for State student financial asistance training.* The application under Section 493C of the Higher Education Act.

(u) *Postsecondary commissions.* The application for intrastate planning under Section 1203(a) of the Higher Education Act.

(v) *Libraries.* The basic State plan a long-range program, and an annual program under the Library Services and Construction Act.

(w) *State equalization.* The application under Section 842 of the Education Amendments of 1974.

(x) *Client Assistance Program.* The written request for assistance under section 112 of the Rehabilitation Act of 1973, as amended.

(y) *Removal of Architectural Barriers to the Handicapped.* The application under Section 607 of the Education of the Handicapped Act.

(z) *Emergency Immigrant Education.* The application under the Emergency Immigrant Education Program.

(aa) *Math-science programs.* The State application under Section 209 of Title II of the Education for Economic Security Act.

(bb) *Programs that do not have regulations.* If a State-administered program does not have implementing regulations, the documents that the authorizing statute for the program requires a State to submit to receive a grant.

(cc) *Carl D. Perkins Scholarship Program.* The application under Section 563 of the Higher Education Act.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 84060, Dec. 22, 1980; 50 FR 9962, Mar. 12, 1985; 50 FR 29330, July 18, 1985; 50 FR 32564, Aug. 13, 1985; 50 FR 33188, Aug. 16, 1985; 50 FR 43545, Oct. 25, 1985; 51 FR 35583, Oct. 6, 1986; 52 FR 27804, July 24, 1987]

§ 76.103 Three-year State plans.

(a) Beginning no later than fiscal year 1981, each State plan will be effective for a period of three fiscal years, unless the program regulations provide for a longer effective period.

(b) If the Secretary determines that the three-year State plans under a program should be submitted by the States on a staggered schedule, the Secretary may require groups of States to submit or resubmit their plans in different years.

(c) This section does not apply to:

(1) The annual accountability report under Part A of Title I of the Vocational Education Act;

(2) The annual programs under the Library Services and Construction Act;

(3) The application under Sections 141-143 of the Elementary and Secondary Education Act; and

(4) The State application under Section 209 of Title II of the Education for Economic Security Act.

(d) A State may submit an annual State plan under the Vocational Education Act. If a State submits an annual plan under that program, this section does not apply to that plan.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1231g(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980; 50 FR 43545, Oct. 25, 1985]

§ 76.104 A State shall include certain certifications in its State plan.

(a) A State shall include the following certifications in each State plan:

(1) That the plan is submitted by the State agency that is eligible to submit the plan.

(2) That the State agency has authority under State law to perform the functions of the State under the program.

(3) That the State legally may carry out each provision of the plan.

(4) That all provisions of the plan are consistent with State law.

(5) That a State officer, specified by title in the certification, has authority under State law to receive, hold, and disburse Federal funds made available under the plan.

(6) That the State officer who submits the plan, specified by title in the certification, has authority to submit the plan.

(7) That the agency that submits the plan has adopted or otherwise formally approved the plan.

(8) That the plan is the basis for State operation and administration of the program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.106 State documents are public information.

A State shall make the following documents available for public inspection:

(a) All State plans and related official materials.

(b) All approved subgrant applications.

(c) All documents that the Secretary transmits to the State regarding a program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CONSOLIDATED GRANT APPLICATIONS FOR INSULAR AREAS

AUTHORITY: Title V, Pub. L. 95-134, 91 Stat. 1159 (48 U.S.C. 1469a).

§ 76.125 What is the purpose of these regulations?

(a) Sections 76.125 through 76.137 of this part contain requirements for the submission of an application by an Insular Area for the consolidation of two or more grants under the programs listed in paragraph (c) of this section.

(b) For the purpose of §§ 76.125-76.137 of this part the term "Insular Area" means the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Commonwealth of the Northern Mariana Islands.

(c) The Secretary may make an annual consolidated grant to assist an Insular Area in carrying out one or more of the following programs:

CFDA No. and name of program	Authorizing legislation	Implementing regulations, Title 34 CFR (Part)
Library Programs		
84.034 Public Library Services State Grant Program	Title I, Library Services and Construction Act (20 U.S.C. 351-354).	770
84.035 Interlibrary Cooperation	Title III, Library Services and Construction Act (20 U.S.C. 355e-355e-2).	770
Postsecondary Education Programs		
84.001 Grants for Construction, Reconstruction, and of Undergraduate Academic Facilities.	Title VII, Part E of the Higher Education Act (20 U.S.C. 1132b-1132b-2).	617
84.046 Education Outreach Programs	Title I, Part B of the Higher Education Act (20 U.S.C. 1011-1019).	610
84.135 Aid to Land-Grant Colleges	Second Morrill Act of 1890 (7 U.S.C. 322 and 323)	621
84.176 Carl D. Perkins Scholarship Program	Title V Part E of the Higher Education Act (20 U.S.C. 1119d-1119d-8).	653
Vocational and Adult Education Programs		
84.002 Adult Education—State-administered Programs.	Adult Education Act (except) Sections 309, 316 and 318) (20 U.S.C. 1201 et seq.).	426
84.048 Vocational Education—Basic Grants to States.	Title I, Part A of the Vocational Education Act (20 U.S.C. 2301-2380).	400
84.049 Vocational Education—Consumer and Homemaking Education.	Title I, Part A, Section 150 of the Vocational Education Act (20 U.S.C. 2380).	400
84.050 Vocational Education—Program Improvement and Services.	Title I, Part A, Section 130-136 of the Vocational Education Act (20 U.S.C. 2350-2356).	400
84.052 Vocational Education—Special Programs for the Disadvantaged.	Title I, Part A, Section 140 of the Vocational Education Act (20 U.S.C. 2370).	400
84.053 Vocational Education—State Advisory Council.	Title I, Part A, Section 105 of the Vocational Education Act (20 U.S.C. 2305).	400
84.121 Vocational Education—State Planning and Evaluation.	Title I, Part A, Sections 102 and 111 of the Vocational Education Act (20 U.S.C. 2302 and 2311).	400
Education for the Handicapped Programs		
84.009 Program for Education of Handicapped Children in State Operated or Supported Schools.	Section 554(a)(2)(B), of Chapter 1 of the Education Consolidation & Improvement Act of 1981 (20 U.S.C. 3803 and 20 U.S.C. 2771-2772).	302
84.027 Handicapped Preschool and School Programs—State Grant Programs.	Education of Handicapped Act Part B (except Section 619) (20 U.S.C. 1411-1418; 1420).	300

CFDA No. and name of program	Authorizing legislation	Implementing regulations, Title 34 CFR (Part)
84.027 Handicapped Preschool and School Program—Incentive Grants.	Section 619 of the Education of the Handicapped Act (20 U.S.C. 1419).	301
84.155 Removal of architectural barriers to the handicapped.	Section 607, Education of the Handicapped Act (20 U.S.C. 1406).	304
Other Elementary and Secondary Programs		
84.010 Educationally Deprived Children—Local Educational Agencies.	Chapter 1 of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 3801–3807).	200
84.011 Migrant Education Programs State Formula Grant Program.	Section 554(a)(2)(A) of Chapter 1 of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 3803 and 20 U.S.C. 2781).	204
84.012 Educationally Deprived Children—State Administration.	Chapter I of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 3801–3807).	200
84.013 Educationally Deprived Children in State Administered Institutions Serving Neglected and Delinquent Children.	Section 554(a)(2)(C) of Chapter 1 of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 3803 and 20 U.S.C. 2781).	203
84.068 Indochinese Refugee Children Assistance Act.	Subpart C of the Consolidated Refugee Assistance Act (8 U.S.C. 1522).	537
84.150 Chapter 2—Consolidation of Federal Programs for Elementary and Secondary Education.	Chapter 2 of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 2811–3862).	298
84.162—Emergency Immigrant Education Program........	Title VI of Pub. L. 98–511 (20 U.S.C. 4101–4108)..........	581
84.164 State Grants for Strengthening the Skills of teachers and Instruction in Mathematics, Science, Foreign Languages, and Computer Learning and for Increasing the Access of All Students to That Instruction.	Title II of the Education for Economic Security Act (20 U.S.C. 3961–3971, 3973).	208

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

[47 FR 17421, Apr. 22, 1982, as amended at 50 FR 29330, July 18, 1985; 50 FR 32564, Aug. 13, 1985; 50 FR 43545, Oct. 25, 1985; 51 FR 35583, Oct. 6, 1986; 54 FR 21776, May 19, 1989]

§ 76.126 What regulations apply to the consolidated grant applications for insular areas?

The following regulations apply to those programs included in a consolidated grant:

(a) The regulations in §§ 76.125 through 76.137; and

(b) The regulations that apply to each specific program included in a consolidated grant for which funds are used.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.127 What is the purpose of a consolidated grant?

An Insular Area may apply for a consolidated grant for two or more of the programs listed in § 76.125(c). This procedure is intended to:

(a) Simplify the application and reporting procedures that would otherwise apply for each of the programs included in the consolidated grant; and

(b) Provide the Insular Area with flexibility in allocating the funds under the consolidated grant to achieve any of the purposes to be served by the programs that are consolidated.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.128 What is a consolidated grant?

A consolidated grant is a grant to an Insular Area for any two or more of the programs listed in § 76.125(c). The amount of the consolidated grant is the sum of the allocations the Insular Area receives under each of the programs included in the consolidated grant if there had been no consolidation.

Example. Assume the Virgin Islands applies for a consolidated grant that includes programs under the Adult Education Act, Vocational Education Act, and Chapter 1 of the Education Consolidation and Improvement Act. If the Virgin Islands' allocation under the formula for each of these three programs is $150,000; the total consolidated grant to the Virgin Islands would be $450,000.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.129 How does a consolidated grant work?

(a) An Insular Area shall use the funds it receives under a consolidated grant to carry out, in its jurisdiction, one or more of the programs included in the grant.

Example. Assume that Guam applies for a consolidated grant under the Vocational Education Act, the Handicapped Preschool and School Programs-Incentive Grants, and the Adult Education Act and that the sum of the allocations under these programs is $700,000. Guam may choose to allocate this $700,000 among all of the programs authorized under the three programs. Alternatively, it may choose to allocate the entire $700,000 to one or two of the programs; for example, the Adult Education Act Program.

(b) An Insular Area shall comply with the statutory and regulatory requirements that apply to each program under which funds from the consolidated grant are expended.

Example. Assume that American Samoa uses part of the funds under a consolidated grant for the State program under the Adult Education Act. American Samoa need not submit to the Secretary a State plan that requires policies and procedures to assure all students equal access to adult education programs. However, in carrying out the program, American Samoa must meet and be able to demonstrate compliance with this equal access requirement.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.130 How are consolidated grants made?

(a) The Secretary annually makes a single consolidated grant to each Insular Area that meets the requirements of §§ 76.125 through 76.137 and each program under which the grant funds are to be used and administered.

(b) The Secretary may decide that one or more programs cannot be included in the consolidated grant if the Secretary determines that the Insular Area failed to meet the program objectives stated in its plan for the previous fiscal year in which it carried out the programs.

(c) Under a consolidated grant, an Insular Area may use a single advisory council for any or all of the programs that require an advisory council.

(d) Although Pub. L. 95-134 authorizies the Secretary to consolidate grant funds that the Department awards to an Insular Area, it does not confer eligibility for any grant funds. The eligibility of a particular Insular Area to receive grant funds under a Federal education program is determined under the statute and regulations for that program.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.131 How does an insular area apply for a consolidated grant?

(a) An Insular Area that desires to apply for a grant consolidating two or more programs listed in § 76.125(c) shall submit to the Secretary an application that:

(1) Contains the assurances in § 76.132; and

(2) Meets the application requirements in paragraph (c) of this section.

(b) The submission of an application that contains these requirements and assurances takes the place of a separate State plan or other similar document required by this part or by the authorizing statutes and regulations for programs included in the consolidated grant.

(c) An Insular Area shall include in its consolidated grant application a program plan that:

(1) Contains a list of the programs in § 76.125(c) to be included in the consolidated grant;

(2) Describes the program or programs in § 76.125(c) under which the consolidated grant funds will be used and administered;

(3) Describes the goals, objectives, activities, and the means of evaluating program outcomes for the programs for which the Insular Area will use the funds received under the consolidated grant during the fiscal year for which it submits the application, including needs of the population that will be met by the consolidation of funds; and

(4) Contains a budget that includes a description of the allocation of funds—including any anticipated carryover funds of the program in the consolidated grant from the preceding year—among the programs to be included in the consolidated grant.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982, as amended at 53 FR 49143, Dec. 6, 1988]

§ 76.132 What assurances must be in a consolidated grant application?

(a) An Insular Area shall include in its consolidated grant application assurances to the Secretary that it will:

(1) Follow policies and use administrative practices that will insure that non-Federal funds will not be supplanted by Federal funds made available under the authority of the programs in the consolidated grant;

(2) Comply with the requirements (except those relating to the submission of State plans or similar documents) in the authorizing statutes and implementing regulations for the programs under which funds are to be used and administered, (except requirements for matching funds);

(3) Provide for proper and efficient administration of funds in accordance with the authorizing statutes and implementing regulations for those programs under which funds are to be used and administered;

(4) Provide for fiscal control and fund accounting procedures to assure proper disbursement of, and accounting for, Federal funds received under the consolidated grant;

(5) Submit an annual report to the Secretary containing information covering the program(s) for which the grant is used and administered, including financial and program performance information required under 34 CFR Part 74, Subparts I and J;

(6) Provide that funds received under the consolidated grant will be under control of, and that title to property acquired with these funds will be in, a public agency, institution, or organization. The public agency shall administer these funds and property;

(7) Keep records, including a copy of the State Plan or application document under which funds are to be spent, which show how the funds received under the consolidated grant have been spent.

(8) Adopt and use methods of monitoring and providing technical assistance to any agencies, organizations, or institutions that carry out the programs under the consolidated grant and enforce any obligations imposed on them under the applicable statutes and regulations.

(9) Evaluate the effectiveness of these programs in meeting the purposes and objectives in the authorizing statutes under which program funds are used and administered;

(10) Conduct evaluations of these programs at intervals and in accordance with procedures the Secretary may prescribe; and

(11) Provide appropriate opportunities for participation by local agencies, representatives of the groups affected by the programs, and other interested institutions, organizations, and individuals in planning and operating the programs.

(b) These assurances remain in effect for the duration of the programs they cover.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.133 What is the reallocation authority?

(a) After an Insular Area receives a consolidated grant, it may reallocate the funds in a manner different from the allocation described in its consolidated grant application. However, the funds cannot be used for purposes that are not authorized under the programs in the consolidated grant under which funds are to be used and administered.

(b) If an Insular Area decides to reallocate the funds it receives under a consolidated grant, it shall notify the Secretary by amending its original application to include an update of the information required under § 76.131.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.134 What is the relationship between consolidated and non-consolidated grants?

(a) An Insular Area may request that any number of programs in § 76.125(c) be included in its consolidated grant and may apply separately for assistance under any other programs listed in § 76.125(c) for which it is eligible.

(b) Those programs that an Insular Area decides to exclude from consolidation—for which it must submit separate plans or applications—are implemented in accordance with the applicable program statutes and regulations. The excluded programs are not subject to the provisions for allocation of funds among programs in a consolidated grant.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.135 Are there any requirements for matching funds?

The Secretary waives all requirements for matching funds for those programs that are consolidated by an Insular Area in a consolidated grant application.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.136 Under what programs may consolidated grant funds be spent?

Insular Areas may only use and administer funds under programs listed in § 76.125(c)(1) during a fiscal year for which the Insular Area is entitled to receive funds under an appropriation for that program.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.137 How may carryover funds be used under the consolidated grant application?

Any funds under any applicable program which are available for obligation and expenditure in the year succeeding the fiscal year for which they are appropriated must be obligated and expended in accordance with the consolidated grant application submitted by the Insular Area for that program for the succeeding fiscal year.

(Authority: 20 U.S.C. 1225(b); 48 U.S.C. 1469a)

AMENDMENTS

§ 76.140 Amendments to a State plan.

(a) If the Secretary determines that an amendment to a State plan is essential during the effective period of the plan, the State shall make the amendment.

(b) A State shall also amend a State plan if there is a significant and relevant change in:

(1) The information or the assurances in the plan;

(2) The administration or operation of the plan; or

(3) The organization, policies, or operations of the State agency that received the grant, if the change materially affects the information or assurances in the plan.

(Authority: 20 U.S.C. 1221e-3(a)(1); 1231g(a))

§ 76.141 An amendment requires the same procedures as the document being amended.

If a State amends a State plan under § 76.140, the State shall use the same procedures as those it must use to prepare and submit a State plan.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.142 An amendment is approved on the same basis as the document being amended.

The Secretary uses the same procedures to approve an amendment to a State plan—or any other document a State submits—as the Secretary uses to approve the original document.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Subpart C—How a Grant Is Made to a State

APPROVAL OR DISAPPROVAL BY THE SECRETARY

§ 76.201 A State plan must meet all statutory and regulatory requirements.

The Secretary approves a State plan if it meets the requirements of the Federal statutes and regulations that apply to the plan.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.202 Opportunity for a hearing before a State plan is disapproved.

The Secretary may disapprove a State plan only after:

(a) Notifying the State;

(b) Offering the State a reasonable opportunity for a hearing; and

(c) Holding the hearing, if requested by the State.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.235 The notification of grant award.

(a) To make a grant to a State, the Secretary issues and sends to the State a notification of grant award.

(b) The notification of grant award tells the amount of the grant and provides other information about the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

ALLOTMENTS AND REALLOTMENTS OF GRANT FUNDS

§ 76.260 Allotments are made under program statute or regulations.

(a) The Secretary allots program funds to a State in accordance with the authorizing statute or implementing regulations for the program.

(b) Any reallotment to other States will be made by the Secretary in accordance with the authorizing statute or implementing regulations for that program.

(Authority: 20 U.S.C. 3474(a)).

[50 FR 29330, July 18, 1985]

§ 76.261 Reallotted funds are part of a State's grant.

Funds that a State receives as a result of a reallotment are part of the State's grant for the appropriate fiscal year. However, the Secretary does not consider a reallotment in determining the maximum or minimum amount to which a State is entitled for a following fiscal year.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Subpart D—How To Apply to the State for a Subgrant

§ 76.300 Contact the State for procedures to follow.

An applicant for a subgrant can find out the procedures it must follow by contacting the State agency that administers the program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See Subparts E and G of this part for the general responsibilities of the State regarding applications for subgrants.

§ 76.301 Local educational agency general application.

A local educational agency that applies for a subgrant under a program subject to this part shall have on file with the State a general application that meets the requirements of Section 436 of the General Education Provisions Act.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1232d)

[52 FR 27804, July 24, 1987; 53 FR 49143, Dec. 6, 1988]

§ 76.302 The notice to the subgrantee.

A State shall notify a subgrantee in writing of:

(a) The amount of the subgrant;

(b) The period during which the subgrantee may obligate the funds; and

(c) The Federal requirements that apply to the subgrant.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.303 Joint applications and projects.

(a) Two or more eligible parties may submit a joint application for a subgrant.

(b) If the State must use a formula to distribute subgrant funds (see § 76.51), the State may not make a subgrant that exceeds the sum of the entitlements of the separate subgrantees.

(c) If the State funds the application, each subgrantee shall:

(1) Carry out the activities that the subgrantee agreed to carry out; and

(2) Use the funds in accordance with Federal requirements.

(d) Each subgrantee shall use an accounting system that permits identification of the costs paid for under its subgrant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.304 Subgrantee shall make subgrant application available to the public.

A subgrantee shall make any application, evaluation, periodic program plan, or report relating to each program available for public inspection.

(Authority: 20 U.S.C. 1221e-3(a)(1); 1232e)

§ 76.305 Amendments to applications.

If a subgrantee makes a significant amendment to its application, the subgrantee shall use the same procedures as those it must use to submit an application.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Subpart E—How a Subgrant Is Made to an Applicant

§ 76.400 State procedures for reviewing an application.

A State that receives an application for a subgrant shall take the following steps:

(a) *Review.* The State shall review the application.

(b) *Approval—entitlement programs.* The State shall approve an application if:

(1) The application is submitted by an applicant that is entitled to receive a subgrant under the program; and

(2) The applicant meets the requirements of the Federal statutes and regulations that apply to the program.

(c) *Approval—discretionary programs.* The State may approve an application if:

(1) The application is submitted by an eligible applicant under a program in which the State has the discretion to select subgrantees;

(2) The applicant meets the requirements of the Federal statutes and regulations that apply to the program; and

(3) The State determines that the project should be funded under the authorizing statute and implementing regulations for the program.

(d) *Disapproval—entitlement and discretionary programs.* If an application does not meet the requirements of the Federal statutes and regulations that apply to a program, the State shall not approve the application.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.401 Disapproval of an application—opportunity for a hearing.

(a) *State agency hearing before disapproval.* Under the following programs the State agency that administers the program shall provide an application with notice and an opportunity for a hearing before it may disapprove the application:

(1) Chapter 1 Program in Local Educational Agencies.

(2) Grants to State Agencies for Programs To Meet the Special Educational Needs of Children in Institutions for Neglected or Delinquent Children.

(3) Supplementary Centers and Services, Guidance, Counseling, and Testing Programs.

(4) Strengthening Instruction in Academic Subjects in Public Schools.

(5) State-operated Programs for Handicapped Children.

(6) Assistance to States for Education of Handicapped Children.

(7) State Vocational Education Programs.

(8) State Grants for Strengthening the Skills of Teachers and Instruction in Mathematics, Science, Foreign Languages, and Computer Learning and for Increasing the Access of All Students to That Instruction.

(9) Federal, State, and Local Partnership for Educational Improvement.

(b) *Other programs—hearings not required.* Under other programs covered by this part, a State agency—other than a State educational agency—is not required to provide an opportunity for a hearing regarding the agency's disapproval of an application.

(c) If an applicant for a subgrant alleges that any of the following actions of a State educational agency violates a State or Federal statute or regulation, the State educational agency and the applicant shall use the procedures in paragraph (d) of this section:

(1) Disapproval of or failure to approve the application or project in whole or in part.

(2) Failure to provide funds in amounts in accordance with the re-

quirements of statutes and regulations.

(d) *State educational agency hearing procedures.* (1) If the applicant applied under a program listed in paragraph (a) of this section, the State educational agency shall provide an opportunity for a hearing before the agency disapproves the application.

(2) If the applicant applied under a program not listed in paragraph (a) of this section, the State educational agency shall provide an opportunity for a hearing either before or after the agency disapproves the application.

(3) The applicant shall request the hearing within 30 days of the action of the State educational agency.

(4)(i) Within 30 days after it receives a request, the State educational agency shall hold a hearing on the record and shall review its action.

(ii) No later than 10 days after the hearing the agency shall issue its written ruling, including findings of fact and reasons for the ruling.

(iii) If the agency determines that its action was contrary to State or Federal statutes or regulations that govern the applicable program, the agency shall rescind its action.

(5) If the State educational agency does not rescind its final action after a review under this paragraph, the applicant may appeal to the Secretary. The applicant shall file a notice of the appeal with the Secretary within 20 days after the applicant has been notified by the State educational agency of the results of the agency's review. If supported by substantial evidence, findings of fact of the State educational agency are final.

(6)(i) The Secretary may also issue interim orders to State educational agencies as he or she may decide are necessary and appropriate pending appeal or review.

(ii) If the Secretary determines that the action of the State educational agency was contrary to Federal statutes or regulations that govern the applicable program, the Secretary issues an order that requires the State educational agency to take appropriate action.

(7) Each State educational agency shall make available at reasonable times and places to each applicant all records of the agency pertaining to any review or appeal the applicant is conducting under this section, including records of other applicants.

(8) If a State educational agency does not comply with any provision of this section, or with any order of the Secretary under this section, the Secretary immediately terminates all assistance to the State educational agency under the applicable program.

(e) *Other State agency hearing procedures.* State agencies that are required to provide a hearing under paragraph (a) of this section—other than State educational agencies—are not required to use the procedures in paragraph (d) of this section.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1221e-3(a)(1); 1231b-2, 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980; 50 FR 43545, Oct. 25, 1985; 52 FR 27805, July 24, 1987; 54 FR 21775 and 21776, May 19, 1989; 55 FR 14816, Apr. 18, 1990]

Subpart F—What Conditions Must Be Met by the State and Its Subgrantees?

NONDISCRIMINATION

§ 76.500 Federal statutes and regulations on nondiscrimination.

A State and a subgrantee shall comply with the following statutes and regulations:

Subject	Statute	Regulation
Discrimination on the basis of race, color, or national origin.	Title VI of the Civil Rights Act of 1964 (45 U.S.C. 2000d through 2000d–4).	34 CFR Part 100.

Subject	Statute	Regulation
Discrimination on the basis of sex.	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681–1683).	34 CFR Part 106.
Discrimination on the basis of handicap.	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).	34 CFR Part 104.
Discrimination on the basis of age.	The Age Discrimination Act (42 U.S.C. 6101 *et seq.*).	45 CFR Part 90.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

ALLOWABLE COSTS

§ 76.530 General cost principles.

Subpart Q of 34 CFR Part 74 references the general cost principles that apply to grants, subgrants, and cost-type contracts under grants and subgrants.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.532 Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of the activities specified in paragraph (a)(1) of this section.

(4) An activity of a school or department of divinity.

(b) As used in this section, "school or department of divinity" means an institution or a component of an institution whose program is specifically for the education of students to:

(1) Prepare them to enter into a religious vocation; or

(2) Prepare them to teach theological subjects.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

§ 76.533 Acquistion of real property; construction.

No State or subgrantee may use its grant or subgrant for acquisition of real property or for construction unless specifically permitted by the authorizing statute or implementing regulations for the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

§ 76.534 Use of tuition and fees restricted.

No State or subgrantee may count tuition and fees collected from students toward meeting matching, cost sharing, or maintenance of effort requirements of a program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

INDIRECT COST RATES

§ 76.560 General indirect cost rates; exceptions.

(a) Appendices C-F to 34 CFR Part 74 include:

(1) A description of the difference between direct and indirect costs; and

(2) The principles for determining the general indirect cost rate that a State or subgrantee may use under some programs.

(b) Section 76.562 provides restrictions on indirect cost rates under certain programs.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.561 Approval of indirect cost rates.

(a) The Secretary approves an indirect cost rate for a State agency and for a subgrantee other than a local educational agency. For the purposes of this section, the term "local educational agency" does not include a State agency.

(b) Each State educational agency, on the basis of a plan approved by the Secretary, shall approve an indirect cost rate for each local educational agency that requests it to do so.

(c) Each indirect cost rate must be approved annually.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.563 Restricted indirect cost rate—programs covered.

If a State or a subgrantee decides to charge indirect costs to a program that has a statutory requirement prohibiting the use of Federal funds to supplant non-Federal funds, the State or subgrantee shall use a restricted indirect cost rate computed under 34 CFR 75.564-75.568.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[55 FR 14816, Apr. 18, 1990]

COORDINATION

§ 76.580 Coordination with other activities.

(a) A State and a subgrantee shall, to the extent possible, coordinate each of its projects with other activities that are in the same geographic area served by the project and that serve similar purposes and target groups.

(b) A State and a subgrantee whose project includes activities to improve the basic skills of children, youth, or adults shall, to the extent possible, coordinate its project with other basic skills activities that are in the same geographic area served by the project.

(c) For the purposes of this section, "basic skills" means reading, mathematics, and effective communication, both written and oral.

(d) The State or subgrantee shall continue its coordination during the period that it carries out the project.

(Authority: 20 U.S.C. 1221e-3(a)(1); 2890)

§ 76.581 Methods of coordination.

Depending on the objectives and requirements of a project, a grantee shall use one or more of the following methods of coordination:

(a) Planning the project with organizations and individuals who have similar objectives or concerns.

(b) Sharing information, facilities, staff, services, or other resources.

(c) Engaging in joint activities such as instruction, needs assessment evaluation, monitoring, technical assistance, or staff training.

(d) Using the grant or subgrant funds so as not to duplicate or counteract the effects of funds used under other programs.

(e) Using the grant or subgrant funds to increase the impact of funds made available under other programs.

(Authority: 20 U.S.C. 1221e-3(a)(1))

EVALUATION

§ 75.591 Federal evaluation—cooperation by a grantee.

A grantee shall cooperate in any evaluation of the program by the Secretary.

(Authority: 20 U.S.C. 1226c, 1231a, 2831(a), 3474)

[45 FR 86298, Dec 30, 1980]

§ 76.592 Federal evaluation—satisfying requirement for State or subgrantee evaluation.

If a State or a subgrantee cooperates in a Federal evaluation of a program, the Secretary may determine that the State or subgrantee meets the evaluation requirements of the program.

(Authority: 20 U.S.C. 1226c; 1231a)

CONSTRUCTION

§ 76.600 Where to find construction regulations.

(a) A State or a subgrantee that requests program funds for construction, or whose grant or subgrant includes funds for construction, shall comply with the rules on construction that apply to applicants and grantees under 34 CFR 75.600-75.615.

(b) The State shall perform the functions that the Secretary performs under §§ 75.602 (Preservation of historic sites) and 75.605 (Approval of drawings and specifications) of this title.

(c) The State shall provide to the Secretary the information required under 34 CFR 75.602(a) (Preservation of historic sites).

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86298, Dec. 30, 1980]

PARTICIPATION OF STUDENTS ENROLLED IN PRIVATE SCHOOLS

§ 76.650 Private schools; purpose of §§ 76.651-76.662.

(a) Under some programs, the authorizing statute requires that a State and its subgrantees provide for participation by students enrolled in private schools. Sections 76.651-76.662 apply to those programs and provide rules for that participation. These sections do not affect the authority of the State or a subgrantee to enter into a contract with a private party.

(b) If any other rules for participation of students enrolled in private schools apply under a particular program, they are in the authorizing statute or implementing regulations for that program.

(Authority: 20 U.S.C. 1221e-3(a)(1)).

NOTE: Some program statutes authorize the Secretary—under certain circumstances—to provide benefits directly to private school students. These "bypass" provisions—where they apply—are implemented in the individual program regulations.

§ 76.651 Responsibility of a State and a subgrantee.

(a)(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in §§ 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b)(1) A State shall ensure that each subgrantee complies with the requirements in §§ 76.651-76.662.

(2) If a State carries out a project directly, it shall comply with these requirements as if it were a subgrantee.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.652 Consultation with representatives of private school students.

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

(1) Which children will receive benefits under the project;

(2) How the children's needs will be identified;

(3) What benefits will be provided;

(4) How the benefits will be provided; and

(5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate representatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The applicant or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.653 Needs, number of students, and types of services.

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

(a) The needs of students enrolled in private schools.

(b) The number of those students who will participate in a project.

(c) The benefits that the subgrantee will provide under the program to those students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.654 Benefits for private school students.

(a) *Comparable benefits.* The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) *Same Benefits.* If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

(c) *Different benefits.* If the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.655 Level of expenditures for students enrolled in private schools.

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.656 Information in an application for a subgrant.

An applicant for a subgrant shall include the following information in its application:

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.

(b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.

(c) The number of students enrolled in private schools who will receive benefits under the program.

(d) The basis the applicant used to select the students.

(e) The manner and extent to which the applicant complied with § 76.652 (consultation).

(f) The places and times that the students will receive benefits under the program.

(g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.657 Separate classes prohibited.

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.658 Funds not to benefit a private school.

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than:

(1) The needs of a private school; or

(2) The general needs of the students enrolled in a private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.659 Use of public school personnel.

A subgrantee may use program funds to make public personnel available in other than public facilities:

(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and

(b) If those benefits are not normally provided by the private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.660 Use of private school personnel.

A subgrantee may use program funds to pay for the services of an employee of a private school if:

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.661 Equipment and supplies.

(a) Under some program statutes, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the subgrantee acquires with program funds. This public agency is usually the subgrantee.

(b) The subgrantee may place equipment and supplies in a private school for the period of time needed for the project.

(c) The subgrantee shall insure that the equipment or supplies placed in a private school:

(1) Are used only for the purposes of the project; and

(2) Can be removed from the private school without remodeling the private school facilities.

(d) The subgrantee shall remove equipment or supplies from a private school if:

(1) The equipment or supplies are no longer needed for the purposes of the project; or

(2) Removal is necessary to avoid use of the equipment of supplies for other than project purposes.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.662 Construction.

A subgrantee shall insure that program funds are not used for the construction of private school facilities.

(Authority: 20 U.S.C. 1221e-3(a)(1))

OTHER REQUIREMENTS FOR CERTAIN PROGRAMS

CROSS-REFERENCE. See 34 CFR Part 74, Subpart C—Bonding and Insurance; and 34 CFR 74.144—Inventions and patents.

PROCEDURES FOR BYPASS

§ 76.670 Applicability.

The regulations in §§ 76.671 through 76.677 apply to the following programs under which the Secretary is authorized to waive the requirements for providing services to private school children and to implement a bypass:

CFDA number and name of program	Authorizing statute	Implementing regulations Title 34 CFR Part
84.010 Chapter 1 Program in Local Educational Agencies.	Chapter 1, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2701 *et seq.*).	200
84.151 Federal, State, and Local Partnership for Educational Improvement.	Chapter 2, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2911-2952, 2971-2976).	298
84.164 Mathematics and Science Education	Title II, Part A, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2981-2993).	208
84.186 State and Local Programs	Part B, Drug Free Schools and Communities Act of 1986 (20 U.S.C. 3191-3197).	None

(Authority: 20 U.S.C. 2727(b), 2972(d)-(e), 2990(c), 3223(c))

[54 FR 21775, May 19, 1989]

§ 76.671 Notice by the Secretary.

(a) Before taking any final action to implement a bypass under a program listed in § 76.670, the Secretary provides the affected grantee and subgrantee, if appropriate, with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed bypass in sufficient detail to allow the grantee and subgrantee to respond;

(2) Cites the requirement that is the basis for the alleged failure to comply; and

(3) Advises the grantee and subgrantee that they—

(i) Have at least 45 days after receiving the written notice to submit written objections to the proposed bypass; and

(ii) May request in writing the opportunity for a hearing to show cause why the bypass should not be implemented.

(c) The Secretary sends the notice to the grantee and subgrantee by certified mail with return receipt requested.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21775, May 19, 1989]

§ 76.672 Bypass procedures.

Sections 76.673 through 76.675 contain the procedures that the Secretary uses in conducting a show cause hearing. The hearing officer may modify the procedures for a particular case if all parties agree the modification is appropriate.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.673 Appointment and functions of a hearing officer.

(a) If a grantee or subgrantee requests a hearing to show cause why the Secretary should not implement a bypass, the Secretary appoints a hearing officer and notifies appropriate representatives of the affected private school children that they may participate in the hearing.

(b) The hearing officer has no authority to require or conduct discovery or to rule on the validity of any statute or regulation.

(c) The hearing officer notifies the grantee, subgrantee, and representatives of the private school children of the time and place of the hearing.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.674 Hearing procedures.

(a) The following procedures apply to a show cause hearing regarding implementation of a bypass:

(1) The hearing officer arranges for a transcript to be taken.

(2) The grantee, subgrantee, and representatives of the private school children each may—

(i) Be represented by legal counsel; and

(ii) Submit oral or written evidence and arguments at the hearing.

(b) Within 10 days after the hearing, the hearing officer—

(1) Indicates that a decision will be issued on the basis of the existing record; or

(2) Requests further information from the grantee, subgrantee, representatives of the private school children, or Department officials.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.675 Posthearing procedures.

(a) (1) Within 120 days after the record of a show cause hearing is closed, the hearing officer issues a written decision on whether a bypass should be implemented.

(2) The hearing officer sends copies of the decision to the grantee, subgrantee, representatives of the private school children, and the Secretary.

(b) Within 30 days after receiving the hearing officer's decision, the grantee, subgrantee, and representatives of the private school children may each submit to the Secretary written comments on the decision.

(c) The Secretary may adopt, reverse, modify, or remand the hearing officer's decision.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.676 Judicial review of a bypass action.

If a grantee or subgrantee is dissatisfied with the Secretary's final action after a proceeding under §§ 76.672 through 76.675, it may, within 60 days after receiving notice of that action, file a petition for review with the United States Court of Appeals for the circuit in which the State is located.

(Authority: 20 U.S.C. 2727(b)(4)(B)-(D), 2972(h)(2)-(4), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.677 Continuation of a bypass.

The Secretary continues a bypass until the Secretary determines that the grantee or subgrantee will meet the requirements for providing services to private school children.

(Authority: 20 U.S.C. 2727(b)(3)(D), 2972(f), 1221e-3(a)(1))

[54 FR 21776, May 19, 1989]

§ 76.681 Protection of human research subjects.

If a State or a subgrantee uses a human subject in a research project, the State or subgrantee shall protect the person from physical, psychological, or social injury resulting from the project.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.682 Treatment of animals.

If a State or a subgrantee uses an animal in a project, the State or subgrantee shall provide the animal with proper care and humane treatment in accordance with the Animal Welfare Act of 1970.

(Authority: Pub. L. 89-544, as amended)

§ 76.683 Health or safety standards for facilities.

A State and a subgrantee shall comply with any Federal health or safety requirements that apply to the facilities that the State or subgrantee uses for a project.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.684 Day care services.

(a) If a State or a subgrantee uses program funds to provide any day care services, the State or subgrantee shall comply with the day care requirements in 45 CFR Part 71 of this title.

(b) The Secretary may waive this requirement by publication of a notice in the FEDERAL REGISTER.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.690 Energy conservation awareness.

To the extent that it is consistent with the statute and regulations for any program, the subgrantee shall consider incorporating into its program a component on energy awareness. This component may include study of the problems, solutions, and alternatives relating to the Nation's energy crisis.

(Authority: 42 U.S.C. 8373(b); E.O. No. 12185)

[45 FR 58013, Aug. 29, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980]

Subpart G—What Are the Administrative Responsibilities of the State and Its Subgrantees?

GENERAL ADMINISTRATIVE RESPONSIBILITIES

§ 76.700 Compliance with statutes, regulations, State plan, and applications.

A State and a subgrantee shall comply with the State plan and applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, plan, and applications.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.701 The State or subgrantee administers or supervises each project.

A State or a subgrantee shall directly administer or supervise the administration of each project.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.702 Fiscal control and fund accounting procedures.

A State and a subgrantee shall use fiscal control and fund accounting procedures that insure proper disbursement of and accounting for Federal funds.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.703 When a State may begin to obligate funds.

(a) A State may not begin to obligate funds under a program until the later of the following two dates:

(1) The date that the State plan is mailed or hand delivered to the Secretary in substantially approvable form.

(2) The date that the funds are first available for obligation by the Secretary.

(b) (1) The State must show one of the following as proof of mailing:

(i) A legibly dated U.S. Postal Service postmark.

(ii) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(iii) A dated shipping label, invoice, or receipt from a commercial carrier.

(iv) Any other proof of mailing acceptable to the Secretary.

(2) If a State plan is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(i) A private metered postmark.

(ii) A mail receipt that is not dated by the U.S. Postal Service.

NOTE: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, a State should check with its local post office.

(c) After determining that a State plan is in substantially approvable form, the Secretary informs the State of the date on which it could begin to obligate funds. Reimbursement for those obligations is subject to final approval of the State plan.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

§ 76.704 When certain subgrantees may begin to obligate funds.

(a) If the authorizing statute for a program requires a State to make subgrants on the basis of a formula (see § 76.5), the State may not authorize an applicant for a subgrant to obligate funds until the later of the following two dates:

(1) The date that the State may begin to obligate funds under § 76.703; or

(2) The date that the applicant submits its application to the State in substantially approvable form.

(b) Reimbursement for obligations under paragraph (a) of this section is subject to final approval of the application.

(c) If the authorizing statute for a program gives the State discretion to select subgrantees, the State may not authorize an applicant for a subgrant to obligate funds until the subgrant is made. However, the State may approve pre-agreement costs in accordance with the cost principles that are appended to 34 CFR Part 74 (Appendices C-F).

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

§ 76.705 Funds may be obligated during a "carryover period."

(a) If a State or a subgrantee does not obligate all of its grant or subgrant funds by the end of the fiscal year for which Congress appropriated the funds, it may obligate the remaining funds during a carryover period of one additional fiscal year.

(b) The State shall return to the Federal Government any carryover funds not obligated by the end of the carryover period by the State and its subgrantees.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: U.S.C. 1225(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980]

§ 76.706 Obligations made during a carryover period are subject to current statutes, regulations, and applications.

A State and a subgrantee shall use carryover funds in accordance with:

(a) The Federal statutes and regulations that apply to the program and are in effect for the carryover period; and

(b) Any State plan, or application for a subgrant, that the State or subgrantee is required to submit for the carryover period.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1225(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980]

§ 76.707 When obligations are made.

The following table shows when a State or a subgrantee makes obligations for various kinds of property and services.

If the obligation is for—	The obligation is made—
(a) Acquisition of real or personal property.	On the date on which the State or subgrantee makes a binding written commitment to acquire the property.
(b) Personal services by an employee of the State or subgrantee.	When the services are performed.
(c) Personal services by a contractor who is not an employee of the State or subgrantee.	On the date on which the State or subgrantee makes a binding written commitment to obtain the services.
(d) Performance of work other than personal services.	On the date on which the State or subgrantee makes a binding written commitment to obtain the work.
(e) Public utility services	When the State or subgrantee receives the services.
(f) Travel	When the travel is taken.
(g) Rental of real or personal property.	When the State or subgrantee uses the property.
(h) A pre-agreement cost that was properly approved by the State.	On the first day of the subgrant period.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 55 FR 14817, Apr. 18, 1990]

REPORTS

§ 76.720 Financial and performance reports by a State.

(a) This section applies to a State's reports required under 34 CFR Part 74, Subparts I (financial reporting) and J (performance reporting).

(b) A state shall submit these reports annually, unless the Secretary allows less frequent reporting.

(c) However, the Secretary may, under 34 CFR 74.7 (Special grant or subgrant conditions) or 34 CFR 74.72(e) (Grantee accounting systems), require a State to report more frequently than annually.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C., 1221e-3(a)(1), 2831(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.722 A subgrantee makes reports required by the State.

A State may require a subgrantee to furnish reports that the State needs to carry out its responsibilities under the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

RECORDS

§ 76.730 Records related to grant funds.

A State and a subgrantee shall keep records that fully show:

(a) The amount of funds under the grant or subgrant;

(b) How the State or subgrantee uses the funds;

(c) The total cost of the project;

(d) The share of that cost provided from other sources; and

(e) Other records to facilitate an effective audit.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1232f)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.731 Records related to compliance.

A State and a subgrantee shall keep records to show its compliance with program requirements.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.734 Record retention period.

A State and a subgrantee shall retain records for five years after completion of the activity for which they use grant or subgrant funds.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1232f(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980; 55 FR 14816, Apr. 18, 1990]

PRIVACY

§ 76.740 Protection of and accessibility to student records.

Most records on present or past students are subject to the requirements of Section 438 of GEPA and its implementing regulations under 34 CFR Part 99. (Section 438 is the Family Educational Rights and Privacy Act of 1974.)

(Authority: 20 U.S.C. 1231g)

USE OF FUNDS BY STATES AND SUBGRANTEES

§ 76.760 More than one program may assist a single activity.

A State or a subgrantee may use funds under more than one program to support different parts of the same project if the State or subgrantee meets the following conditions:

(a) The State or subgrantee complies with the requirements of each program with respect to the part of the project assisted with funds under that program.

(b) The State or subgrantee has an accounting system that permits identification of the costs paid for under each program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

§ 76.761 Federal funds may pay 100 percent of cost.

A State or a subgrantee may use program funds to pay up to 100 percent of the cost of a project if:

(a) The State or subgrantee is not required to match the funds; and

(b) The project can be assisted under the authorizing statute and implementing regulations for the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

STATE ADMINISTRATIVE RESPONSIBILITIES

§ 76.770 A State shall perform certain duties with respect to the applications for subgrants.

With respect to each program that authorizes subgrants, a State shall perform the following duties and any other duties required by statute or regulations:

(a) Disseminate information regarding the availability of funds under each program.

(b) Develop procedures for applicants to follow in completing and submitting applications for subgrants.

(c) Provide application forms.

(d) Assist applicants in applying for funds.

(e) Review applications and, within the limits of available funds, award subgrants.

(f) Notify each applicant as to whether it will receive a subgrant.

(g) Not act in any manner that prevents eligible applicants from applying under the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.771 A State shall encourage eligible applicants to apply.

(a) Each State shall make a reasonable effort to encourage eligible applicants to apply for subgrants.

(b) The State shall inform eligible applicants of:

(1) The availability of subgrants;

(2) The objectives of each program;

(3) The objectives of the State plan for each program;

(4) The assistance the State provides to an applicant in completing and submitting an application; and

(5) The procedures the State uses to select applications for funding.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1222c-3(a)(1))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.772 Other responsibilities of the State.

(a) A State shall:

(1) Provide technical assistance to prospective applicants and subgrantees;

(2) Assist in the evaluation of projects;

(3) Develop and use procedures to monitor each project; and

(4) Develop procedures, issue rules, or take whatever action may be necessary to properly administer each program and to avoid illegal, imprudent, wasteful, or extravagant use of funds by the State or a subgrantee.

(b) This section applies to the program under Title IV of the Elementary and Secondary Education Act unless administrative funds for that program are appropriated under Title V-A of that Act.

(c) This section does not apply to the program under Title I of the Elementary and Secondary Education Act.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27805, July 24, 1987]

COMPLAINT PROCEDURES OF THE STATE

§ 76.780 A State shall adopt complaint procedures.

(a) A State shall adopt written procedures for:

(1) Receiving and resolving any complaint that the State or a subgrantee is violating a Federal statute or regulations that apply to a program;

(2) Reviewing an appeal from a decision of a subgrantee with respect to a complaint; and

(3) Conducting an independent on-site investigation of a complaint if the State determines that an on-site investigation is necessary.

(b) Sections 76.780–76.782 apply to the program under Title IV of the Elementary and Secondary Education Act unless administrative funds for that program are appropriated under Title V-A of that Act.

(c) Sections 76.780–76.782 do not apply to the program under Title I of the Elementary and Secondary Education Act.

(Approved by the Office of Management and Budget under control number 1880-0513)

CROSS-REFERENCE. See § 76.1 Programs to which Part 76 applies.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.781 Minimum complaint procedures.

A State shall include the following in its complaint procedures:

(a) A time limit of 60 calendar days after the State receives a complaint:

(1) If necessary, to carry out an independent on-site investigation; and

(2) To resolve the complaint.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) The right to request the Secretary to review the final decision of the State.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.782 An organization or individual may file a complaint.

An organization or individual may file a written signed complaint with a State. The complaint must include:

(a) A statement that the State or a subgrantee has violated a requirement of a Federal statute or regulations that apply to a program; and

(b) The facts on which the statement is based.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.783 State educational agency action—subgrantee's opportunity for a hearing.

(a) A subgrantee may request a hearing if it alleges that any of the following actions by the State educational agency violated a State or Federal statute or regulation:

(1) Ordering, in accordance with a final State audit resolution determination, the repayment of misspent or misapplied Federal funds; or

(2) Terminating further assistance for an approved project.

(b) The procedures in § 76.401(c)(2)-(7) apply to any request for a hearing under this section.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1231b-2)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980]

Subpart H—What Procedures Does the Secretary Use to Get Compliance?

§ 76.900 Waiver of regulations prohibited.

(a) No official, agent, or employee of ED may waive any regulation that applies to a Department program unless the regulation specifically provide that it may be waived.

(b) No act or failure to act by an official, agent, or employee of ED can affect the authority of the Secretary to enforce regulations.

(Authority: 43 Dec. Comp. Gen. 31(1963))

§ 76.901 Education Appeal Board.

(a) The Education Appeal Board, established under Part E of GEPA, has the following functions:

(1) Audit appeal hearings under Section 452 of GEPA.

(2) Withholding and termination hearings under Section 453 of GEPA.

(3) Cease and desist hearings under Section 453 of GEPA.

(4) Any other proceeding designated by the Secretary.

(b) The regulations for the Education Appeal Board are in 34 CFR Part 78.

(Authority: 20 U.S.C. 1234)

§ 76.902 Judicial review.

After a hearing by the Secretary, a State is usually entitled—generally by the statute that required the hearing—to judicial review of the Secretary's decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.910 Cooperation with audits.

A grantee or subgrantee shall cooperate with the Secretary and the Comptroller General of the United States or any of their authorized representatives in the conduct of audits authorized by Federal law. This cooperation includes access without unreasonable restrictions to records and personnel of the grantee or subgrantee for the purpose of obtaining relevant information.

(Authority: 5 U.S.C. Appendix 3, Sections 4(a)(1), 4(b)(1)(A), and 6(a)(1); 20 U.S.C. 1221e-3(a)(1), 1232f)

[54 FR 21776, May 19, 1989]

PART 77—DEFINITIONS THAT APPLY TO DEPARTMENT REGULATIONS

§ 77.1 Definitions that apply to all Department programs.

(a) [Reserved]

(b) Unless a statute or regulation provides otherwise, the following definitions in Part 74 of this title apply to the regulations in Title 34 of the Code of Federal Regulations. The section of Part 74 that contains the definition is given in parentheses.

Budget (74.104)
Contract (includes definition of "Subcontract") (74.3)
Equipment (74.132)
Federally recognized Indian tribal government (74.3)
Grant (74.3)
Grantee (74.3)
Local government (74.3)
Personal property (74.132)
Real property (74.132)
Recipient (74.3)
Subgrant (74.3)
Subgrantee (74.3)
Supplies (74.132)

(c) Unless a statute or regulation provides otherwise, the following definitions also apply to the regulations in this title:

Acquisition means taking ownership of property, receiving the property as a gift, entering into a lease-purchase arrangement, or leasing the property. The term includes processing, delivery, and installation of property.

Applicant means a party requesting a grant or subgrant under a program of the Department.

Application means a request for a grant or subgrant under a program of the Department.

Award means an amount of funds that the Department provides under a grant or contract.

Budget period means an interval of time into which a project period is divided for budgetary purposes.

Department means the U.S. Department of Education.

Director of the Institute of Musuem Services means the Director of the Institute of Museum Services or an officer or employee of the Institute of Museum Services acting for the Director under a delegation of authority.

Director of the National Institute of Education means the Director of the National Institute of Education or an officer or employee of the National Institute of Education acting for the Director under a delegation of authority.

ED means the U.S. Department of Education.

EDGAR means the Education Department General Administrative Regulations (34 CFR Parts 74, 75, 76, 77, and 78).

Elementary school means a day or residential school that provides elementary education, as determined under State law.

Facilities means one or more structures in one or more locations.

Fiscal year means the Federal fiscal year—a period beginning on October 1 and ending on the following September 30.

GEPA means The General Education Provisions Act.

Grant period means the period for which funds have been awarded.

Local educational agency means:

(a) A public board of education or other public authority legally constituted within a State for either administrative control of or direction of, or to perform service functions for, public elementary or secondary schools in:

(1) A city, county, township, school district, or other political subdivision of a State; or

(2) Such combination of school districts or counties a State recognizes as an administrative agency for its public elementary or secondary schools; or

(b) Any other public institution or agency that has administrative control and direction of a public elementary or secondary school.

(c) As used in 34 CFR Parts 400, 408, 525, 526 and 527 (vocational education programs), the term also includes any other public institution or agency that has administrative control and direction of a vocational education program.

Minor remodeling means minor alterations in a previously completed building. The term also includes the extension of utility lines, such as water and electricity, from points beyond the confines of the space in which the minor remodeling is undertaken but within the confines of the previously completed building. The term does not include building construction, stuctural alterations to buildings, building maintenance, or repairs.

Nonprofit, as applied to an agency, organization, or institution, means that it is owned and operated by one or more corporations or associations whose net earnings do not benefit, and cannot lawfully benefit, any private shareholder or entity.

Nonpublic, as applied to an agency, organization, or institution, means that the agency, organization, or institution is nonprofit and is not under Federal or public supervision or control.

Preschool means the educational level from a child's birth to the time at which the State provides elementary education.

Private, as applied to an agency, organization, or institution, means that it is not under Federal or public supervision or control.

Project means the activity described in an application.

Project period means the period for which the appropriate official of the Department approves a project.

Public, as applied to an agency, organization, or institution, means that the agency, organization, or institution is under the administrative supervision or control of a government other than the Federal Government.

Secondary school means a day or residential school that provides secondary education as determined under State law. In the absence of State law, the Secretary may determine, with respect to that State, whether the term includes education beyond the twelfth grade.

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

Service function, with respect to a local educational agency:

(a) Means an educational service that is performed by a legal entity—such as an intermediate agency:

(1) (i) Whose jurisdiction does not extend to the whole State; and

(ii) That is authorized to provide consultative, advisory, or educational services to public elementary or secondary schools; or

(2) That has regulatory functions over agencies having administrative control or direction of public elementary or secondary schools.

(b) The term does not include a service that is performed by a cultural or educational resource.

State means any of the 50 States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

State educational agency means the State board of education or other agency or officer primarily responsible for the supervision of public elementary and secondary schools in a State. In the absence of this officer or agency, it is an officer or agency designated by the Governor or State law.

Work of art means an item that is incorporated into facilities primarily because of its aesthetic value.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

[45 FR 22529, Apr. 3, 1980, as amended at 45 FR 37442, June 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86298, Dec. 30, 1980; 54 FR 21776, May 19, 1989]

PART 78—EDUCATION APPEAL BOARD

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AUTHORITY: 20 U.S.C. 1234-1234c (1982), unless otherwise noted.

SOURCE: 46 FR 27305, May 18, 1981, unless otherwise noted.

Subpart A—General

§ 78.1 Purpose.

These regulations contain rules for the conduct of proceedings before the Education Appeal Board which was established in accordance with Section 451 of the General Education Provision Act.

(Authority: 20 U.S.C. 1234 (a) and (e))

§ 78.2 Jurisdiction.

The Board has jurisdiction to:

(a) Review final audit determinations concerning any applicable program (See § 78.3 (*Definitions*) for the definition of an applicable program.).

(b) Conduct withholding or termination hearings initiated by Department of Education (ED) officials in connection with any applicable program (See § 78.3 (*Definitions*) for the definition of an applicable program.).

(c) Conduct cease and desist proceedings initiated by authorized ED officials in connection with any applicable program (See § 78.3 (*Definitions*) for the definition of an applicable program.).

(d) Conduct hearings, in connection with an applicable program (See § 78.3 (*Definitions*) for the definition of an applicable program), which involve:

(1) A determination that a grant is void;

(2) The disapproval of a recipient's written request for permission to incur an expenditure during the term of a grant; or

(3) A determination made by an authorized ED official with respect to cost allocation plans negotiated with State and local units of government, and indirect cost rates, computer, fringe benefit, and other special rates negotiated with institutions of postsecondary education, State and local gov-

ernment agencies, hospitals, and other nonprofit institutions (except for determinations which are the subject of an appeal filed by the grantee to the Grant Services Contract Appeal Board or to the Armed Services Board of Contract Appeals regarding a contract with the Department); and

(e) Conduct other proceedings as designated by the Secretary of Education (the Secretary) in the FEDERAL REGISTER.

(Authority: 20 U.S.C. 1234(a), 2832(b))

[46 FR 27305, May 18, 1981, as amended at 54 FR 21776 Dec. 19, 1989]

§ 78.3 Definitions.

Appellant means an SEA or other recipient that requests:

(a) A review of a final audit determination;

(b) A witholding or termination hearing; or

(c) A hearing regarding a matter described in § 78.2(d) (*Jurisdiction*).

Applicable program means any program administered by an authorized ED official except the following student financial assistance programs authorized by Title IV, and governed by regulations promulgated under Section 487, of the Higher Education Act of 1965, as amended:

(a) National Direct Student Loan Program.

(b) College Work-Study Program.

(c) Pell Grant Program, formerly known as the Basic Educational Opportunity Grant Program.

(d) Supplemental Educational Opportunity Grant Program.

(e) Guaranteed Student Loan Program.

(f) Parent Loans for Undergraduate Students Program.

(g) State Student Incentive Grant Program.

Authorized ED official means:

(a) The Secretary; or

(b) A person employed by ED who has been designated to act under the Secretary's authority.

Board means the Education Appeal Board of ED.

Board Chairperson means the Board member designated by the Secretary to serve as administrative officer of the Board.

Cease and desist means to discontinue a prohibited practice or initiate a required practice.

Final audit determination means a written notice issued by an authorized ED official disallowing expenditures made by a recipient.

Hearing means any review proceeding conducted by the Board. A hearing may include a conference, a review of written submissions, an oral argument, or a full evidentiary hearing.

Panel means an Education Appeal Board Panel (See § 78.5, (*Panels*)).

Panel Chairperson means the person designated by the Board Chairperson to serve as the presiding officer of a Panel.

Party means:

(a) The recipient requesting or appearing at a hearing under these regulations;

(b) The authorized ED official who issued:

(1) The final audit determination being appealed, the notice of an intent to withhold or terminate funds, or the cease and desist complaint; or

(2) Any other determination that is the subject of a proceeding before the Board (See § 78.2(d) (*Jurisdiction*) for a list of these determinations.); and

(c) Any person, group, or agency that files an acceptable application to intervene (See § 78.43 (*Intervention*)).

Recipient means the named party or entity that initially receives Federal funds under an ED grant or cooperative agreement. For example, for a State-administered program conducted under Title I of the Elementary and Secondary Education Act of 1965, as amended, the SEA is the recipient. This definition does not extend to procurement contracts.

Suspension means temporarily stopping payment of Federal funds to a recipient and stopping the recipient's authority to charge costs to a program pending the outcome of a withholding or termination hearing.

Termination means ending the payment of Federal funds to a recipient and ending the recipient's authority to charge costs to a program before the recipient's authority to charge costs to a program expires.

Withholding means stopping payment of Federal funds to a recipient and stopping the recipient's authority to charge costs to a program, for the period of time the recipient is in violation of a requirement.

(Authority: 20 U.S.C. 1234 (a) and (e))

[46 FR 27305, May 18, 1981, as amended at 54 FR 21776, Dec. 19, 1989]

§ 78.4 Board membership.

The Board consists of 15 to 30 members. Not more than one-third of the Board members may be employees of ED.

(Authority: 20 U.S.C. 1234(c))

§ 78.5 Panels.

(a) (1) For each proceeding before the Board, the Board Chairperson selects a Panel, consisting of at least three members of the Board, and designates one of the Panel members as Panel Chairperson.

(2) The Board Chairperson may designate the entire Board to sit as a Panel for any case or class of cases.

(b) A majority of the members of a Panel must be members of the Board who are not full-time employees of the Federal Government.

(c) No Board member who is a party to, or has had any responsibility for the particular matter assigned to a Panel, may serve on that Panel.

(Authority: 20 U.S.C. 1234 (a), (d), and (e))

§ 78.6 Eligibility for review.

Review under these regulations is available to a recipient that receives a written notice from an authorized ED official of:

(a) A final audit determination;

(b) An intent to withhold or terminate funds;

(c) A cease and desist complaint;

(d) A determination that a grant is void;

(e) The disapproval of a recipient's written request for permission to incur an expenditure during the term of a grant;

(f) A determination with respect to cost allocation plans negotiated with State and local units of government, and indirect cost rates, computer, fringe benefits, and other special rates negotiated with institutions of postsecondary education, State and local government agencies, hospitals, and other nonprofit institutions (except for determinations which are the subject of an appeal filed by the grantee to the Grant Services Contract Appeal Board or to the Armed Services Board of Contract Appeals regarding a contract with the Department); or

(g) Any other proceeding designated by the Secretary.

(Authority: 20 U.S.C. 1234 (a) and (e), 20 U.S.C. 2832(b))

[46 FR 27305, May 18, 1981, as amended at 54 FR 21776, Dec. 19, 1989]

§ 78.7 Exhaustion of remedies.

(a) If a recipient receives a written notice referred to in § 78.6 (*Eligibility for review*) and brings a lawsuit to challenge that notice, the recipient has failed to exhaust administrative remedies and the Secretary may move for dismissal of the lawsuit on that basis.

(b) If the Panel assigned to hear an appeal finds that there are no issues in the appeal within the Board's jurisdiction, the Panel may, at the request of a party or Panel member, issue a decision or order to that effect (See Subpart F—Decisions and Orders).

(Authority: 20 U.S.C. 1234 and 1234(d))

Subpart B—Final Audit Determination

WRITTEN NOTICE

§ 78.11 Written notice of a final audit determination.

(a) An authorized ED official may issue a written notice of a final audit determination to a recipient in connection with an applicable program (See § 78.3 for the definition of applicable program.)

(b) In the written notice, the authorized ED official:

(1) Lists the disallowed expenditures made by the recipient;

(2) Indicates the reasons for the final audit determination in sufficient detail to allow the recipient to respond—for example, by referring to the relevant parts of a separate document, such as an audit report; and

(3) Advises the recipient that it must repay the disallowed expenditures to

ED or, within 30 calendar days of its receipt of the written notice, request a review by the Board of the final audit determination.

(c) The authorized ED official sends the written notice to the recipient by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234a(a))

§ 78.12 Review of the written notice.

(a) The Board Chairperson reviews the written notice of the final audit determination after an application for review is received (See § 78.13 (*Filing an application for review*)) to insure that the written notice meets the requirements of § 78.11(b) (*Written notice of a final audit determination*).

(b) If the Board Chairperson decides that the written notice does not meet the requirements of § 78.11(b) (*Written notice of a final audit determination*), the Board Chairperson returns the determination to the official who issued it so that the determination may be properly modified.

(c) If the official makes the appropriate modifications and the recipient wishes to pursue its appeal to the Board, the recipient shall amend its application for review within 30 calendar days of the date it receives the modification.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234a(b))

APPLICATION FOR REVIEW

§ 78.13 Filing an application for review.

(a) An appellant seeking review of a final audit determination by the Board shall file a written application for review with the Board Chairperson.

(b) The appellant shall attach a copy of the written notice of a final audit determination to the application for review, and shall, to the satisfaction of the Board Chairperson:

(1) Identify the issues and facts in dispute; and

(2) State the appellant's position, together with the pertinent facts and reasons supporting that position.

(c) The appellant shall file the application for review no later than 30 calendar days after the date it receives the written notice of the final audit determination.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234a(b))

§ 78.14 Acceptance of the application for review.

(a) If the Board Chairperson decides that an application for review satisfies the requirements of § 78.13 (*Filing an application for review*), the Board Chairperson issues a notice of the acceptance of the application to the appellant and the authorized ED official who issued the final audit determination.

(b) The Board Chairperson publishes a notice of acceptance of the application in the FEDERAL REGISTER prior to the scheduling of initial proceedings.

(c) If an acceptable application is filed, the Board Chairperson refers the appeal to a Panel, arranges for the scheduling of initial proceedings, and forwards to the Panel and parties an initial hearing record that includes:

(1) The final audit determination;

(2) The application for review; and

(3) Other relevant documents, such as audit reports.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234a(b))

§ 78.15 Rejection of the application for review.

(a) If the Board Chairperson determines that an application for review does not satisfy the requirements of § 78.13 (*Filing an application for review*), the Board Chairperson returns the application to the appellant, together with the reasons for the rejection, by certified mail with return receipt requested.

(b) The appellant has 20 calendar days after the date it receives the notice of rejection to file an acceptable application.

(c) If an application for review is rejected twice, ED may take appropriate administrative action to collect the expenditures disallowed in the final audit determination.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234a(b))

BURDEN OF PROOF

§ 78.16 Burden of proof.

The appellant shall present its case first and has the burden of proving the allowability of the expenditures disallowed in the final audit determination.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234a(b))

Subpart C—Withholding, Termination, Voiding, and Other Cost Determinations

WRITTEN NOTICE

§ 78.21 Written notice of an intent to withhold or terminate funds, void a grant, or of other cost determinations.

(a) An authorized ED official may issue a written notice to a recipient under any applicable program (See § 78.3 (*Definitions*) for the definition of applicable program) of:

(1) An intent to withhold or terminate funds; or

(2) A determination, as described in paragraphs (d) through (f) of § 78.6 (*Eligibility for review*) that a grant is void, that a request to incur an expenditure during the term of a grant is denied, or a determination with respect to cost allocation plans, indirect cost rates, or other special rates.

(b) In the written notice, the authorized ED official:

(1) In the case of an intent to withhold or terminate funds, states the facts that indicate the recipient failed to comply substantially with a requirement that applies to the funds;

(2) In the case of a determination that a grant is void, that an expenditure may not be incurred, or a determination with respect to cost allocation plans, indirect cost rates, or other special rates, states the reasons for the determination;

(3) Cites the requirement that is the basis for the alleged failure to comply or for the determination; and

(4) Advises the recipient that it may request a hearing before the Board.

(c) The authorized ED official sends the written notice to the recipient by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234b(a) and (b))

[46 FR 27305, May 18, 1981, as amended at 54 FR 21776, Dec. 19, 1989]

APPLICATION FOR A HEARING

§ 78.22 Filing an application for a hearing.

(a) An appellant seeking a withholding or termination hearing, or a hearing regarding a determination described in paragraphs (d) through (f) of § 78.6 (*Eligibility for review*), shall file a written application with the Board Chairperson not later than 30 calendar days after the date it receives the written notice.

(b) In the application for a hearing, the appellant shall attach a copy of the written notice and shall, to the satisfaction of the Board Chairperson:

(1) Identify the issues and facts in dispute; and

(2) State the appellant's position, together with the pertinent facts and reasons supporting that position.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234b(b))

[46 FR 27305, May 18, 1981, as amended at 54 FR 21777, Dec. 19, 1989]

§ 78.23 Acceptance of the application.

(a) If the appellant files an application that meets the requirements of § 78.22 (*Filing an application for a hearing*), the Board Chairperson issues a notice of the acceptance of the application to the appellant and to the authorized ED official who issued the notice of the intent to withhold or terminate, or the determination that is the subject of the appeal.

(b) The Board Chairperson publishes a notice of acceptance of the application in the FEDERAL REGISTER. prior to the scheduling of initial proceedings.

(c) If the appellant files an acceptable application, the Board Chairperson refers the appeal to a Panel, arranges for the scheduling of a hearing, and forwards to the Panel and the parties an initial hearing record that includes:

(1) The written notice;

(2) The application for a hearing; and

(3) Other relevant documents.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234b(b))

§ 78.24 Rejection of the application.

(a) If the Board Chairperson determines that an application for a hearing does not satisfy the requirements of § 78.22 (*Filing an application for a hearing*), the Board Chairperson returns the application to the appellant, together with the reasons for the rejection, by certified mail with return receipt requested.

(b) The appellant has 20 calendar days after the date it receives the notice of rejection to file an acceptable application.

(c) If an application is rejected twice, ED takes appropriate administrative action to withhold or terminate funds, or to enforce the final determination in question.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234b(b))

SUSPENSION OF PAYMENTS

§ 78.25 Written notice of an intent to suspend funds.

(a) An authorized ED official may issue to the recipient a written notice of an intent to suspend funds during the course of the withholding or termination hearing.

(b) In the written notice, the authorized ED official:

(1) Indicates the reasons for the suspension; and

(2) Advises the recipient that the suspension becomes effective 10 calendar days after the date the recipient receives the written notice, unless within those 10 calendar days the recipient requests an opportunity to show cause why payments should not be suspended.

(c) The authorized ED official sends the written notice to the recipient by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234b(c))

§ 78.26 Request to show cause.

A recipient seeking an opportunity to show cause why payments should not be suspended shall submit a written request for a show cause hearing to the authorized ED official who issued the written notice.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234b(c))

§ 78.27 Show cause hearing.

(a) If a show cause hearing is requested, the authorized ED official:

(1) Notifies the recipient of the time and place for the hearing; and

(2) Designates a person to conduct the show cause hearing. The designee does not have to be a member of the Board but may not be a party to, or have had any responsibility for, the matter before the Board.

(b) At the show cause hearing, the designee considers matters such as:

(1) The necessity for the suspension of payments;

(2) Possible factual errors in the written notice of the intent to withhold or terminate;

(3) The nature of the violation charged in the written notice of the intent to withhold or terminate; and

(4) Hardship resulting from the suspension.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234b(c))

§ 78.28 Decision.

(a) The designee who conducts the show cause hearing:

(1) Decides whether there should be a suspension during the course of the withholding or termination hearing;

(2) Issues a written decision which includes a statement of findings;

(3) Submits the decision to the Board Chairperson; and

(4) Sends a copy of the decision to the recipient by certified mail with return receipt requested.

(b) The designee's decision is effective on receipt by the recipient and is not subject to review by the Secretary.

(c) The Board Chairperson retains the designee's decision as part of the record of the withholding or termination hearing.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234b(c))

Subpart D—Cease and Desist

WRITTEN NOTICE

§ 78.31 Written notice of a cease and desist complaint.

(a) An authorized ED official may issue a written notice of a cease and desist complaint to a recipient receiving funds under an applicable program (See § 78.3 (*Definitions*) for the definition of an applicable program.). The cease and desist proceeding may be used as an alternative to a withholding or termination hearing.

(b) In the written notice, the authorized ED official:

(1) States the facts that indicate the recipient failed to comply substantially with a requirement that applies to the funds;

(2) Cites the requirement that is the basis for the alleged failure to comply; and

(3) Gives notice of a hearing that is to be held at least 30 calendar days after the date the recipient receives the written notice.

(c) The authorized ED official sends the written notice to the recipient by certified mail with return receipt requested.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234c(a))

HEARING

§ 78.32 Right to appear at the cease and desist hearing.

The recipient has the right to appear at the cease and desist hearing, which is held before a Panel of the Board on the date specified in the complaint.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234c(b))

§ 78.33 Opportunity to show cause.

At the hearing the recipient shall have the opportunity to present reasons why a cease and desist order should not be issued by the Board based on the violation of law stated in the complaint.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234c(b))

ORDER

§ 78.34 Written report and order.

If, after the hearing, the Panel decides that the recipient has violated a legal requirement as stated in the complaint, the Panel:

(a) Makes a written report stating its findings of fact; and

(b) Issues a cease and desist order (See § 78.85 (*The cease and desist report and order.*)).

(Authority: 20 U.S.C. 1234 (a) and (e), 1234c(c))

Subpart E—Practice and Procedure

GENERAL RULES

§ 78.41 Applicability of this subpart.

This subpart applies only to proceedings before the Board.

(Authority: 20 U.S.C. 1234(e))

§ 78.42 Applicability of other laws and regulations.

(a) Sections 554, 556, and 557 of the Administrative Procedure Act (5 U.S.C.) apply to proceedings before the Board with respect to:

(1) The receipt of oral or written testimony;

(2) Notice of the issues to be considered;

(3) The right to counsel;

(4) Intervention of third parties; and

(5) Transcripts of proceedings.

(b) Except as provided in paragraph (c), other provisions of the Administrative Procedure Act and the Federal Rules of Civil Procedure do not apply to proceedings before the Board.

(Authority: Sec. 451(e) of GEPA, 20 U.S.C. 1234(e))

[46 FR 27305, May 18, 1981, as amended at 47 FR 52354, Nov. 19, 1982; 54 FR 21777, Dec. 19, 1989]

§ 78.43 Intervention.

(a) A person, group, or agency with an interest in and having relevant information about a case before the Board may file with the Board Chairperson an application to intervene.

(b) The application to intervene shall contain:

(1) A statement of the applicant's interest; and

(2) A summary of the relevant information.

(c) (1) If the application is filed before a case is assigned to a Panel, the Board Chairperson decides whether approval of the application to intervene will aid the Panel in its disposition of the case.

(2) If the application is filed after the Board Chairperson has assigned the case to a Panel, the Panel decides whether approval of the application to intervene will aid the Panel in its disposition of the case.

(d) The Board Chairperson notifies the applicant seeking to intervene and the other parties of the approval or disapproval of the application to intervene.

(e) If an application to intervene is approved, the intervenor becomes a party to the proceedings.

(f) If an application to intervene is disapproved, the applicant may submit to the Board Chairperson an amended application to intervene.

(Authority: 20 U.S.C. 1234(e))

§ 78.44 Representation by counsel.

Parties may be represented by counsel.

(Authority: 20 U.S.C. 1234(e))

§ 78.45 Filing of documents.

(a) An applicant shall file with the Board Chairperson one copy of an application for review or to intervene.

(b) Once a Panel has been assigned, parties shall:

(1) File with the Board Chairperson five copies of all written motions, briefs—including cited materials that are not readily available—and other documents; and

(2) Provide a copy to each of the other parties to the proceedings.

(c) Parties have 25 calendar days from the date of receipt of any motion to file a response with the Board Chairperson, unless the Panel Chairperson grants an extension for a good reason.

(d) The date of filing is the date the document is postmarked or hand-delivered to the Office of the Board Chairperson. If a scheduled filing date occurs on a Saturday, Sunday, or Federal holiday, the next business day is the date of filing.

(Authority: 20 U.S.C. 1234(e))

§ 78.46 Availability of decisions.

The Board Chairperson maintains the files of the Board. The decisions of the Board are available to the public on request and with payment of reproduction costs.

(Authority: 20 U.S.C. 1234(e))

§ 78.47 Communications.

No party shall communicate with the Panel or Board Chairperson on matters under review, except minor procedural matters, unless all parties to the case are given:

(a) Timely and adequate notice of the communication; and

(b) Reasonable opportunity to respond.

(Authority: 20 U.S.C. 1234(e))

§ 78.48 Transcripts.

(a) The Board Chairperson:

(1) Arranges for the preparation of a transcript of each hearing;

(2) Retains the original transcript as part of the record of the hearing; and

(3) Provides one copy of the transcript to each party and Panel member.

(b) Additional copies of the transcript are available on request and with payment of the reproduction fee.

(Authority: 20 U.S.C. 1234(e))

§ 78.49 Subpoenas.

(a) The Panel does not have authority to issue subpoenas.

(b) The Panel may ask a party to provide for oral or written examination one or more available witnesses who have knowledge about the matter under review.

(Authority: 20 U.S.C. 1234(e))

§ 78.50 Exchange of information.

There is no discovery as conducted under the Federal Rules of Civil Procedure, but the parties are encouraged to exchange relevant documents and information.

(Authority: 20 U.S.C. 1234(e))

§ 78.51 Evidence.

The Panel accepts any evidence that it finds is relevant and material to the proceedings. Parties may object to evidence they consider to be irrelevant, immaterial, or unduly repetitious.

(Authority: 20 U.S.C. 1234(e))

§ 78.52 Panel decisions.

Decisions of the Panel are made by a majority of the Panel members.

(Authority: 20 U.S.C. 1234(e))

§ 78.53 Intermediate review.

The parties may not file comments with the Secretary regarding matters under review on any rulings of a Panel until the Panel has reached its decision (See § 78.81 (*The Panel's decision*).).

(Authority: 20 U.S.C. 1234(e))

PANEL PROCEEDINGS

§ 78.61 Authority and responsibilities of Panels.

(a) The Panel may regulate the course of proceedings and the conduct of the parties during the proceedings. The Panel takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including the following:

(1) The Panel may hold conferences or other types of appropriate proceedings to clarify, simplify, or define the issues or to consider other matters that may aid in the disposition of an appeal.

(2) The Panel may require parties to state their positions and to provide all or part of the evidence in writing.

(3) The Panel may require parties to present testimony through affidavits and to conduct cross-examination through interrogatories.

(4) The Panel may direct the parties to exchange relevant documents or information and lists of witnesses, and to send copies to the Panel.

(5) The Panel may receive, rule on, exclude, or limit evidence at any stage of the proceedings.

(6) The Panel may rule on motions and other issues at any stage of the proceedings.

(7) Although hearings are open to the general public, the Panel may establish reasonable rules for public attendance and media coverage of the proceedings.

(8) The Panel may examine witnesses.

(9) The Panel may set reasonable time limits for submission of written documents.

(10) The Panel may end an appeal and issue a decision against a party if that party does not meet the time limits set by the Panel or otherwise delays the Panel.

(b) The Panel may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(Authority: 20 U.S.C. 1234(e))

§ 78.62 Conferences.

(a) The Board Chairperson may schedule a prehearing conference of the Panel members and parties.

(b) A Panel member or party may request a conference of the Panel members and parties except in the case of a show cause proceeding. The Panel Chairperson decides whether a conference is necessary.

(c) At a prehearing or other conference the Panel and the parties may consider subjects such as:

(1) Narrowing and clarifying issues;

(2) Assisting the parties in reaching agreements and stipulations;

(3) Clarifying the positions of the parties;

(4) Presenting the direct case of the parties in writing, in whole or in part, or conducting an oral argument or evidentiary hearing;

(5) Setting dates for the exchange of written documents, the receipt of comments from the parties on the need for an oral argument or evidentiary hearing, and further proceedings before the Panel; and

(6) Requesting the names of witnesses each party wishes to present at an evidentiary hearing and estimates of time for each presentation.

(d) At a prehearing or other conference the parties shall be prepared to respond to the subjects listed in paragraph (c) of this section.

(e) Following a prehearing or other conference the Panel may issue a written statement describing the issues raised, the action taken, and the stipulations and agreements reached by the parties.

(Authority: 20 U.S.C. 1234(e))

PRESENTATION OF CASE

§ 78.71 Written submission normally required.

The parties shall present their positions through briefs and the submission of other documents but may request an oral argument or evidentiary hearing. The Panel shall determine whether an oral argument or evidentiary hearing is needed to clarify the position of the parties.

(Authority: 20 U.S.C. 1234(e))

§ 78.72 Notice of an oral argument or evidentiary hearing.

If the Panel decides that an oral argument or evidentiary hearing is necessary, the Panel Chairperson sends written notice of this decision to all parties. The notice states the time and place of the proceeding and the issues to be considered. The notice may be published in the FEDERAL REGISTER upon the request of a party or Panel member.

(Authority: 20 U.S.C. 1234(e))

§ 78.73 Conduct of a hearing.

A hearing is generally conducted by all the Panel members, but, if circumstances require, a hearing may be conducted by one or more Panel members. All the Panel members shall participate in the Panel's decision.

(Authority: 20 U.S.C. 1234(e))

Subpart F—Decision and Orders

FINAL AUDIT DETERMINATIONS, WITHHOLDINGS, TERMINATIONS, AND OTHER DETERMINATIONS

§ 78.81 The Panel's decision.

The Panel issues a decision in the appeal from the final audit determination, or the intent to withhold or terminate funds, or other determinations that are the subject of the proceedings. The Board Chairperson submits the Panel's decision to the Secretary and sends a copy to each party by certified mail with return receipt reques ed.

(Authority: 20 U.S.C. 1234 (a) and (1234a(d), 1234b(d))

§ 78.82 Opportunity to comment on th Panel's decision.

(a) *Initial comments and recommen dations.* Each party has the opport nity to file comments and recomme dations on the Panel's decision wit the Board Chairperson within 15 ca endar days of the date the party re ceives the Panel's decision.

(b) *Responsive comments and recom mendations.* The Board Chairperso sends a copy of a party's initial com ments and recommendations to eac of the other parties by certified mai with return receipt requested. Eac party may file responsive comment and recommendations with the Boar Chairperson within seven days of th date the party receives the initial com ments and recommendations.

(c) The Board Chairperson forwar the parties' initial and responsive com ments on the Panel's decision to th Secretary.

(Authority: 20 U.S.C. 1234 (a) and (1234a(d), 1234b(d))

§ 78.83 The Secretary's decision.

(a) The Panel's decision becomes th final decision of the Secretary 60 ca endar days after the date the recipien receives the Panel's decision, unle the Secretary, for good cause show modifies or sets aside the Panel's dec sion.

(b) If the Secretary modifies or se aside the Panel's decision within th 60 days, the Secretary issues a decisio that:

(1) Includes a statement of the rea sons for this action; and

(2) Becomes the Secretary's final de cision 60 calendar days after it i issued.

(c) The Board Chairperson sends copy of the Secretary's final decisio and statement of reasons, or a notic that the Panel's decision has becom the Secretary's final decision, to th panel and to each of the parties.

(d) The final decision of the Secre tary is the final decision of the De partment.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234a(d), 1234b(d), 1234d)

§ 78.84 Collection.

If the final decision of the Secretary sustains the final audit determination, the intent to withhold or terminate funds or other determination, ED takes immediate steps to collect the debt, withhold or terminate funds, or to effect the determination that was the subject of the Board proceedings.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234a(e), 1234b)

CEASE AND DESIST

§ 78.85 The cease and desist report and order.

(a) If the Panel issues a cease and desist report and order (described in § 78.34 (*Written report and order*)), the Board Chairperson sends the report and order to the recipient by certified mail with return receipt requested.

(b) The order becomes final 60 calendar days after the date the order is received by the recipent. The order is not subject to review by the Secretary.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234c(d), 1234d)

§ 78.86 Enforcement.

(a) If the Panel issues a cease and desist report and order, the recipient shall take immediate steps to comply with the order.

(b) If, after a reasonable period of time, the Secretary determines that the recipient has not complied with the cease and desist order, the Secretary may:

(1) Withhold funds payable to the recipient under the affected program, including funds payable for administrative costs, without any further proceedings before the Board; or

(2) Certify the facts of the matter to the Attorney General for enforcement through appropriate proceedings.

(Authority: 20 U.S.C. 1234 (a) and (e), 1234c(e))

PART 79—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF EDUCATION PROGRAMS AND ACTIVITIES

Sec.

79.1 What is the purpose of these regulations?
79.2 What definitions apply to these regulations?
79.3 What programs and activities of the Department are subject to these regulations?
79.4 What are the Secretary's general responsibilities under the Order?
79.5 What is the Secretary's obligation with respect to federal interagency coordinations?
79.6 What procedures apply to the selection of programs and activities under these regulations?
79.7 How does the Secretary communicate with state and local officials concerning the Department's programs and activities?
79.8 How does the Secretary provide states an opportunity to comment on proposed federal financial assistance?
79.9 How does the Secretary receive and respond to comments?
79.10 How does the Secretary make efforts to accommodate intergovernmental concerns?
79.11 What are the Secretary's obligations in interstate situations?
79.12 How may a state simplify, consolidate, or substitute federally required state plans?
79.13 [Reserved]

AUTHORITY: 31 U.S.C. 6506; 42 U.S.C. 3334; and E.O. 12372, unless otherwise noted.

SOURCE: 48 FR 29166, June 24, 1983, unless otherwise noted.

§ 79.1 What is the purpose of these regulations?

(a) The regulations in this Part implement Executive Order 12372, "Intergovernmental Review of Federal Programs," issued July 14, 1982 and amended on April 8, 1983. These regulations also implement applicable provisions of Section 401 of the Intergovernmental Cooperation Act of 1968 and Section 204 of the Demonstration Cities and Metropolitan Development Act of 1966.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on state processes and on state, areawide, regional, and local coordination for review of proposed federal financial assistance.

(c) These regulations are intended to aid the internal management of the Department, and are not intended to create any right or benefit enforceable at law by a party against the Department or its officers.

(Authority: E.O. 12372)

§ 79.2 What definitions apply to these regulations?

"Department" means the U.S. Department of Education.

"Order" means Executive Order 12372, issued July 14, 1982, amended April 8, 1983, and titled "Intergovernmental Review of Federal Programs."

"Secretary" means the Secretary of the U.S. Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

"State" means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

(Authority: E.O. 12372)

§ 79.3 What programs and activities of the Department are subject to these regulations?

(a) The Secretary publishes in the FEDERAL REGISTER a list of the Department's programs and activities that are subject to these regulations and identifies which of these are subject to the requirements of section 204 of the Demonstration Cities and Metropolitan Development Act.

(b) If a program or activity of the Department that provides Federal financial assistance does not have implementing regulations, the regulations in this part apply to that program or activity.

(c) The following programs and activities are excluded from coverage under this part:

(1) Proposed legislation.

(2) Regulation and budget formulation.

(3) National security matters.

(4) Procurement.

(5) Direct payments to individuals.

(6) Financial transfers for which the Department has no funding discretion or direct authority to approve specific sites or projects (e.g., block grants under Chapter 2 of the Education Consolidation and Improvement Act of 1981).

(7) Research and development national in scope.

(8) Assistance to federally recognized Indian tribes.

(d) In addition to the programs and activities excluded in paragraph (c) of this section, the Secretary may only exclude a Federal financial assistance program or activity from coverage under this part if the program or activity does not directly affect State or local governments.

(Authority: E.O. 12372)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20824, June 9, 1986]

§ 79.4 What are the Secretary's general responsibilities under the Order?

(a) The Secretary provides opportunities for consultation by elected officials of those state and local governments that would provide the nonfederal funds for, or that would be directly affected by, proposed federal financial assistance from the Department.

(b) If a state adopts a process under the Order to review and coordinate proposed federal financial assistance, the Secretary, to the extent permitted by law:

(1) Uses the state process to determine official views of state and local elected officials;

(2) Communicates with state and local elected officials as early in a program planning cycle as is reasonably feasible to explain specific plans and actions;

(3) Makes efforts to accommodate state and local elected official's concerns with proposed federal financial assistance that are communicated through the state process;

(4) Allows the states to simplify and consolidate existing federally required state plan submissions;

(5) Where state planning and budgeting systems are sufficient and where permitted by law, encourages the sub-

stitution of state plans for federally required state plans;

(6) Seeks the coordination of views of affected state and local elected officials in one state with those of another state when proposed federal financial assistance has an impact on interstate metropolitan urban centers or other interstate areas; and

(7) Supports state and local governments by discouraging the reauthorization or creation of any planning organization which is federally funded, which has a limited purpose, and which is not adequately representative of, or accountable to, state or local elected officials.

(Authority: E.O. 12372, Sec. 2)

§ 79.5 What is the Secretary's obligation with respect to federal interagency coordination?

The Secretary, to the maximum extent practicable, consults with and seeks advice from all other substantially affected federal departments and agencies in an effort to assure full coordination between such agencies and the Department regarding programs and activities covered under these regulations.

(Authority: E.O. 12372)

§ 79.6 What procedures apply to the selection of programs and activities under these regulations?

(a) A state may select any program or activity published in the FEDERAL REGISTER in accordance with § 79.3 for intergovernmental review under these regulations. Each state, before selecting programs and activities, shall consult with local elected officials.

(b) Each state that adopts a process shall notify the Secretary of the Department's programs and activities selected for that process.

(c) A state may notify the Secretary of changes in its selections at any time. For each change, the state shall submit to the Secretary an assurance that the state has consulted with local elected officials regarding the change. The Department may establish deadlines by which states are required to inform the Secretary of changes in their program selections.

(d) The Secretary uses a state's process as soon as feasible, depending on individual programs and activities, after the Secretary is notified of its selections.

(Authority: E.O. 12372, sec. 2)

§ 79.7 How does the Secretary communicate with state and local officials concerning the Department's programs and activities?

(a) [Reserved]

(b) (1) The Secretary provides notice to directly affected state, areawide, regional, and local entities in a state of proposed federal financial assistance if:

(i) The state has not adopted a process under the Order; or

(ii) The assistance involves a program or activity not selected for the state process.

(2) This notice may be made by publication in the FEDERAL REGISTER or other means which the Secretary determine appropriate.

(Authority: E.O. 12372, Sec. 2)

§ 79.8 How does the Secretary provide states an opportunity to comment on proposed federal financial assistance?

(a) Except in unusual circumstances, the Secretary gives State processes or directly affected State, areawide, regional, and local officials and entities—

(1) At least 30 days to comment on proposed Federal financial assistance in the form of noncompeting continuation awards; and

(2) At least 60 days to comment on proposed Federal financial assistance other than noncompeting continuation awards.

(b) The Secretary establishes a date for mailing or hand-delivering comments under paragraph (a) of this section using one of the following two procedures:

(1) If the comments relate to continuation award applications, the Secretary notifies each applicant and each State Single Point of Contact (SPOC) of the date by which SPOC comments should be submitted.

(2) If the comments relate to applications for new grants, the Secretary

establishes the date in a notice published in the FEDERAL REGISTER.

(c) This section also applies to comments in cases in which the review, coordination, and communication with the Department have been delegated.

(d) Applicants for programs and activities subject to Section 204 of the Demonstration Cities and Metropolitan Act shall allow areawide agencies a 60-day opportunity for review and comment.

(Authority: E.O. 12372, Sec. 2)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20825, June 9, 1986]

§ 79.9 How does the Secretary receive and respond to comments?

(a) The Secretary follows the procedure in § 79.10 if:

(1) A state office or official is designated to act as a single point of contact between a state process and all federal agencies, and

(2) That office or official transmits a State process recommendation, and identifies it as such, for a program selected under § 79.6.

(b) (1) The single point of contact is not obligated to transmit comments from state, areawide, regional, or local officials and entities if there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from state, areawide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, areawide, regional, and local officials and entities may submit comments to the Department.

(d) If a program or activity is not selected for a state process, state, areawide, regional, and local officials and entities may submit comments to the Department. In addition, if a state process recommendation for a nonselected program or activity is transmitted to the Department by the single point of contact, the Secretary follows the procedures of § 79.10.

(e) The Secretary considers comments which do not constitute a state process recommendation submitted under these regulations and for which the Secretary is not required to apply the procedures of § 79.10 of this Part, if those comments are provided by a single point of contact, or directly to the Department by a commenting party.

(Authority: E.O. 12372, Sec. 2)

[48 FR 29166, June 24, 1983, as amended at 51 FR 20825, June 9, 1986]

§ 79.10 How does the Secretary make efforts to accommodate intergovernmental concerns?

(a) If a state process provides a state process recommendation to the Department through its single point of contact, the Secretary either:

(1) Accepts the recommendation;

(2) Reaches a mutually agreeable solution with the state process; or

(3) Provides the single point of contact with a written explanation of the decision in such form as the Secretary deems appropriate. The Secretary may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Secretary informs the single point of contact that:

(1) The Department will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the waiting period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of the notification.

(Authority: E.O. 12372, Sec. 2)

§ 79.11 What are the Secretary's obligations in interstate situations?

(a) The Secretary is responsible for:

(1) Identifying proposed federal financial assistance that has an impact on interstate areas;

(2) Notifying appropriate officials and entities in states which have adopted a process and which select the Department's program or activity.

(3) Making efforts to identify and notify the affected state, areawide, regional, and local officials and entities in those states that have not adopted a process under the Order or do not select the Department's program or activity;

(4) Responding under § 79.10 if the Secretary receives a recommendation from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with the Department have been delegated.

(b) In an interstate situation subject to this section, the Secretary uses the procedures in § 79.10 if a state process provides a state process recommendation to the Department through a single point of contact.

(Authority: E.O. 12372, Sec. 2(e))

§ 79.12 How may a state simplify, consolidate, or substitute federally required state plans?

(a) As used in this section:

(1) "Simplify" means that a state may develop its own format, choose its own submission date, and select the planning period for a state plan.

(2) "Consolidate" means that a state may meet statutory and regulatory requirements by combining two or more plans into one document and that the state can select the format, submission date, and planning period for the consolidated plan.

(3) "Substitute" means that a state may use a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) If not inconsistent with law, a state may decide to try to simplify, consolidate, or substitute federally required state plans without prior approval by the Secretary.

(c) The Secretary reviews each state plan that a state has simplified, consolidated, or substituted and accepts the plan only if its contents meet federal requirements.

(Authority: E.O. 12372, sec. 2)

§ 79.13 [Reserved]

PART 80—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

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APPENDIX TO PART 80—AUDIT REQUIREMENTS FOR STATE AND LOCAL GOVERNMENTS

AUTHORITY: 20 U.S.C. 3474; OMB Circular A—102, unless otherwise noted.

SOURCE: 53 FR 8071 and 8087, Mar. 11, 1988, unless otherwise noted.

Subpart A—General

§ 80.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.3 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which i was acquired. Other charges such a the cost of installation, transportation taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports and retention of records. These are distinguished from "*programmatic*" requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered a grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for "*grant*" and "*subgrant*" in this section and except where qualified by "*Federal*") a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For nonconstruction grants, the SF-269 "Financial Status Report" (or other equivalent report); (2) for construction grants, the SF-271 "Outlay Report and Request for Reimbursement" (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the United States Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of inkind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

(1) The definition of "State" in this section is used for the purpose of determining the scope of Part 80 regulations. Some program regulations contain different definitions for "State" based on program statute eligibility requirements.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of "*grant*" in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than "*equipment*" as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. "*Termination*" does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period; (2) Withdrawal of the unobligated balance as of the expiration of a grant; (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

§ 80.4 Applicability.

(a) *General.* Subparts A through of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 80.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in § 80.4(a) (3) through (8) are subject to Subpart E.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § 80.6.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.6 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by the Secretary after consultation with OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

Subpart B—Pre-Award Requirements

§ 80.10 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF-424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.11 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, "Intergovernmental Review of Federal Programs," States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.12 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered "high risk" if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grante or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

§ 80.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to:

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of preaward review or at any time subsequent to award.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.21 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR Part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 80.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) For each kind of organization, there is a set of Federal principles for determining allowable costs. For the costs of a State, local, or Indian tribal government, the Secretary applies the cost principles in OMB Circular A-87, as amended on June 9, 1987.

For the costs of a—	Use the principles in—
State, local or Indian tribal government.	OMB Circular A-87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A-122 as not subject to that circular.	OMB Circular A-122.
Educational institutions	OMB Circular A-21.
For-profit organization other than a hospital and an organization named in OBM Circular A-122 as not subject to that circular.	48 CFR Part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

§ 80.23 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-269). The Federal agency may extend this deadline at the request of the grantee.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions*—(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 80.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 80.25(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 80.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.25 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 80.34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 80.31 and 80.32.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.26 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act of 1984 (31 U.S.C. 7501-7) and Federal agency implementing regulations. The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act, that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subgrantee shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, "Uniform Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations" have met the audit requirement. Commercial contractors (private forprofit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local govenments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A-110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have

access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, § 80.36 shall be followed.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

NOTE: The requirements for non-Federal audits are contained in the Appendix to Part 80—Audit Requirements for State and Local Governments.

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

CHANGES, PROPERTY, AND SUBAWARDS

§ 80.30 Changes.

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see § 80.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes*—(1) *Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 80.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost prin-

ciples (see § 80.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.31 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

(d) The provisions of paragraph (c) of this section do not apply to disaster assistance under 20 U.S.C. 241-1(b)-(c) and the construction provisions of the Impact Aid Program, 20 U.S.C. 631-647.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

§ 80.32 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 80.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow § 80.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

(h) The provisions of paragraphs (c), (d), (e), and (g) of this section do not apply to disaster assistance under 20 U.S.C. 241-1(b)-(c) and the construction provisions of the Impact Aid Program, 20 U.S.C. 631-647.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988; 53 FR 49143, Dec. 6, 1988]

§ 80.33 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.36 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms,

conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative anaylsis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only:

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judg-

ment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition.* (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 80.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*—(1) *Procurement by small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 80.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price resonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see § 80.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solication has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this seciton; or

(ii) The procurement is expected to exceed $25,000 and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed $25,000, specifies a "brand name" product; or

(iv) The proposed award over $25,000 is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than $25,000.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis;

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subconstracts exceeding $100,000, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate (Contracts other than small purchases).

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement (All contracts in excess of $10,000).

(3) Compliance with Executive Order 11246 of September 24, 1965 entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR Chapter 60) (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees).

(4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3) (All contracts and subgrants for construction or repair).

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) as supplemented by Department of Labor regulations (29 CFR Part 5) (Construction contracts in excess of $2,000 awarded by grantees and subgrantees when required by Federal grant program legislation).

(6) Compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2,000, and in excess of $2,500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clear Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15) (Contracts, subcontracts, and subgrants of amounts in excess of $100,000).

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.37 Subgrants.

(a) *States.* States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 80.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 80.10;

(2) Section 80.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR Part 205, cited in § 80.21; and

(4) Section 80.50.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

§ 80.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance informatio available from subsequent applicatio contains sufficient information t meet its programmatic needs, requi the grantee to submit a performanc report only upon expiration or term nation of grant support. Unless waive by the Federal agency this report wi be due on the same date as the fin Financial Status Report.

(1) Grantees shall submit annu performance reports unless the awar ing agency requires quarterly or sem annual reports. However, performanc reports will not be required more fr quently than quarterly. Annual r ports shall be due 90 days after th grant year, quarterly or semi-annu reports shall be due 30 days after th reporting period. The final performance report will be due 90 days afte the expiration or termination of gra support. If a justified request is su mitted by a grantee, the Feder agency may extend the due date fo any performance report. Additionally requirements for unnecessary pe formance reports may be waived b the Federal agency.

(2) Performance reports will contai for each grant, brief information o the following:

(i) A comparison of actual accomplishments to the objectives esta lished for the period. Where th output of the project can be quant fied, a computation of the cost pe unit of output may be required if tha information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, ana ysis and explanation of cost overrun or high unit costs.

(3) Grantees will not be required t submit more than the original and tw copies of performance reports.

(4) Grantees will adhere to th standards in this section in prescribin performance reporting requirement for subgrantees.

(c) *Construction performance r ports.* For the most part, on-site tech nical inspections and certified percent age-of-completion data are relied o heavily by Federal agencies to monito progress under construction grant and subgrants. The Federal agenc will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.41 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extend required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*—(1) *Form.* Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with § 80.41(e)(2)(iii).

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accural basis, the grantee shall not be required to convert its ac-

best copy available

counting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*—(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in § 80.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs.* (1) *Grants that support construction activities paid by reimbursement method.* Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § 80.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 80.41(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any

necessary special instruction. However, frequency and due date shall be governed by § 80.41(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 80.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 80.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 80.41(b)(2).

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.42 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 80.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(4) A recipient that receives funds under a program subject to 20 U.S.C. 1232f (section 437 of the General Education Provisions Act) shall retain records for a minimum of five years after the starting date specified in paragraph (c) of this section.

(c) *Starting date of retention period*—(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988; 53 FR 49143, Dec. 6, 1988]

§ 80.43 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see § 80.35).

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.44 Termination for convenience.

Except as provided in § 80.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 80.43 or paragraph (a) of this section.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

Subpart D—After-the-Grant Requirements

§ 80.50 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) *Final performance or progress report.*

(2) *Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF-271) (as applicable).*

(3) *Final request for payment (SF-270) (if applicable).*

(4) *Invention disclosure (if applicable).*

(5) *Federally-owned property report:* In accordance with § 80.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 80.42;

(d) Property management requirements in §§ 80.31 and 80.32; and

(e) Audit requirements in § 80.26.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an adminstrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart E—Entitlement [Reserved]

APPENDIX TO PART 80—AUDIT REQUIREMENTS FOR STATE AND LOCAL GOVERNMENTS

1. *Purpose.* This appendix is issued pursuant to the Single Audit Act of 1984, Pub. L. 98-502. It establishes audit requirements for State and local governments that receive Federal aid, and defines Federal responsibilities for implementing and monitoring those requirements.

2. *Policy.* The Single Audit Act requires the following:

a. State or local governments that receive $100,000 or more a year in Federal financial assistance shall have an audit made in accordance with this appendix.

b. State or local governments that receive between $25,000 and $100,000 a year shall have an audit made in accordance with this appendix, or in accordance with Federal laws and regulations governing the programs they participate in.

c. State or local governments that receive less than $25,000 a year shall be exempt from compliance with the Act and other Federal audit requirements. These State and local governments shall be governed by audit requirements prescribed by State or local law or regulation.

d. Nothing in this paragraph exempts State or local governments from maintaining records of Federal financial assistance or from providing access to such records to Federal agencies, as provided for in Federal law, including 34 CFR Part 74.

3. *Definitions.* For the purposes of this appendix the following definitions from the Single Audit Act apply:

a. "Cognizant agency" means the Federal agency assigned by the Office of Management and Budget to carry out the responsibilities described in paragraph 9 of this appendix.

b. "Federal financial assistance" means assistance provided by a Federal agency in the form of grants, contracts, cooperative agreements, loans, loan guarantees, property, interest subsidies, insurance, or direct appropriations, but does not include direct Federal cash assistance to individuals. It includes awards received directly from Federal agencies, or indirectly through other units of State and local governments.

c. "Federal agency" has the same meaning as the term "agency" in section 551(1) of Title 5, Unitied States Code.

d. "Generally accepted accounting principles" has the meaning specified in the generally accepted government aduiting standards.

e. "Generally accepted government auditing standards" means the *Standards For Audits of Government Organizations, Programs, Activities, and Functions*, developed by the Comptroller General, dated February 27, 1981.

f. "Independent auditor" means"

(1) A State or local government auditor who meets the independence standards specified in generally accepted government auditing standards; or

(2) A public accountant who meets such independence standards.

g. "Internal controls" means the plan of organization and methods and procedures adopted by management to ensure that:

(1) Resources use is consistent with laws, regulations, and policies;

(2) Resources are safeguarded against waste, loss, and misuse; and

(3) Reliable data are obtained, maintained, fairly disclosed in reports.

h. "Indian tribe" means any Indian tribe, band , nations, or other organized group or community, including any Alaskan Native village or regional or village corporations (as defined in, or established under, the Alaskan Native Claims Settlement Act) that is recognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

i. "Local government" means any unit of local government within a State, including a county, a borough, municipality, city, town, township, parish, local public authority, special district, school district, intrastate district, council of governments, and any other instrumentality of local government.

j. "Major Federal Assistance Program," as defined by Pub. L. 98-502, is described in the Attachment to this appendix.

k. "Public accountants" means those individuals who meet the qualification standards included in generally accepted government auditing standards for personnel performing government audits.

l. "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands and the Trust Territory of the Pacific Islands, any instrumentality thereof, and any multi-State, regional, or interstate entity that has government functions and any Indian tribe.

m. "Subrecipient" means any person or government department, agency, or establishment that receives Federal financial assistance to carry out a program through a State or local government, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a direct recipient of Federal financial assistance.

4. *Scope of audit.* The Single Audit Act provides that:

a. The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

b. The audit shall cover the entire operations of a State or local government or, at the option of that government, it may cover departments, agencies or establishments that received, expended, or otherwise administered Federal financial assistance during the year. However, if a State or local government receives $25,000 or more in General Revenue Sharing Funds in a fiscal year, it shall have an audit of its entire operations. A series of audits of individual departments, agencies, and establishments for the same fiscal year may be considered a single audit.

c. Public hospitals and public colleges and universities may be excluded from State and local audits and the requirements of this appendix. However, if such entities are excluded, audits of these entities shall be made in accordance with statutory requirements and the provisions of 34 CFR Part 74.

d. The auditor shall determine whether.

(1) The financial statements of the government, department, agency or establishment present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) The organization has internal accounting and other control systems to provide reasonable assurance that it is managing Federal financial assistance programs in compliance with applicable laws and regulations; and

(3) The organization has complied with laws and regulations that may have material effect on its financial statements and on each major Federal assistance program.

5. *Frequency of audit.* Audits shall be made annually unless the State or local government has, by January 1, 1987, a constitutional or statutory requirement for less frequent audits. For those governments, the cognizant agency shall permit biennial audits, covering both years, if the government so requests. It shall also honor requests for biennial audits by governments that have an administrative policy calling for audits less frequent than annual, but only for fiscal years beginning before January 1, 1987.

6. *Internal control and compliance reviews.* The Single Audit Act requires that the independent auditor determine and report on whether the organization has internal control systems to provide reasonable assurance that it is managing Federal assistance programs in compliance with applicable laws and regulations.

a. *Internal control review.* In order to provide this assurance the auditor must make a study and evaluation of internal control systems used in administering Federal assistance programs. The study and evaluation must be made whether or not the auditor intends to place reliance on such systems. As part of this review, the auditor shall:

(1) Test whether these internal control systems are functioning in accordance with prescribed procedures.

(2) Examine the recipient's system for monitoring subrecipients and obtaining and acting on subrecipient audit reports.

b. *Compliance review.* The law also requires the auditor to determine whether the organization has complied with laws and regulations that may have a material effect on each major Federal assistance program.

(1) In order to determine which major programs are to be tested for compliance, State and local governments shall identify in their accounts all Federal funds received and expended and the programs under

which they were received. This shall include funds received directly from Federal agencies and through other State and local governments.

(2) The review must include the selection and testing of a representative number of charges from each major Federal assistance program. The selection and testing of transactions shall be based on the auditor's professional judgment considering such factors as the amount of expeditures for the program and the individual awards; the newness of the program or changes in its conditions; prior experience with the program, particularly as revealed in audits and other evaluations (e.g., inspections, program reviews); the extent to which the program is carried out through subrecipients; the extent to which the program contracts for goods or services; the level to which the program is already subject to program reviews or other forms of independent oversight; the adequacy of the controls for ensuring compliance; the expectation of adherence or lack of adherence to the applicable laws and regulations; and the potential impact of adverse findings.

(a) In making the test of transactions, the auditor shall determine whether:

—The amounts reported as expenditures were for allowable services, and
—The records show that those who received services services or benefits were eligible to receive them.

(b) In addition to transaction testing, the auditor shall determine whether:

—Matching requirements, levels of effort and earmarking limitations were met,
—Federal financial reports and claims for advances and reimbursements contain information that is supported by the books and records from which the basic financial statements have been prepared, and
—Amounts claimed or used for matching were determined in accordance with 34 CFR Part 74, Appendix C "Principles for Determining Costs Applicable to Grants and Contracts with State and Local Governments," and 34 CFR Part 74, Subpart G, "Cost Sharing or Matching."

(c) The principal compliance requirements of the largest Federal aid programs may be ascertained by referring to the *Compliance Supplement for Single Audits of State and Local Governments*, issued by OMB and available from the Government Printing Office. For those programs not covered in the Compliance Supplement, the auditor may ascertain compliance requirements by researching the statues, regulations, and agreements governing individual programs.

(3) Transactions related to other Federal assistance programs that are selected in connection with examinations of financial statements and evaluations of internal controls shall be tested for compliance with Federal laws and regulations that apply to such transactions.

7. *Subrecipients.* State or local governments that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subrecipient shall:

a. determine whether State or local subrecipients have met the audit requirements of this appendix and whether subrecipients covered by 34 CFR Part 74 have met the requirements of that part.

b. determine whether the subrecipient spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subrecipient made in accordance with this appendix, 34 CFR Part 74, or through other means (e.g., program reviews) if the subrecipient has not yet had such an audit;

c. ensure that appropriate corrective action is taken within six months after receipt of the audit report in instances of noncompliance with Federal laws and regulations;

d. consider whether subrecipient audits necessitate adjustment of the recipient's own records; and

e. require each subrecipient to permit independent auditors to have access to the records and financial statements as necessary to comply with this appendix.

8. *Relation to other audit requirements.* The Single Audit Act provides that an audit made in accordance with this appendix shall be in lieu of any financial or financial compliance audit required under individual Federal assistance programs. To the extent that a single audit provides Federal agencies with information and assurances they need to carry out their overall responsibilities, they shall rely upon and use such information. However, a Federal agency shall make any additional audits which are necessary to carry out its responsibilities under Federal law and regulation. Any additional Federal audit effort shall be planned and carried out in such a way as to avoid duplication.

a. The provisions of this appendix do not limit the authority of Federal agencies to make, or contract for audits and evaluations of Federal financial assistance programs, nor do they limit the authority of any Federal agency Inspector General or other Federal audit official.

b. The provisions of this appendix do not authorize any State or local government or subrecipient thereof to constrain Federal agencies, in any manner, from carrying out additional audits.

c. A Federal agency that makes or contracts for audits in addition to the audits made by recipients pursuant to this appendix shall, consistent with other applicable laws and regulations, arrange for funding the cost of such additional audits. Such additional audits include economy and efficiency audits, program results audits, and program evaluations.

9. *Cognizant agency responsibilities.* The Single Audit Act provides for cognizant Federal agencies to oversee the implementation of this appendix.

a. The Office of Management and Budget will assign cognizant agencies for States and their subdivisions and larger local governments and their subdivisions. Other Federal agencies may participate with an assigned cognizant agency, in order to fulfill the cognizant responsibilities. Smaller governments not assigned a cognizant agency will be under the general oversight of the Federal agency that provides them the most funds whether directly or indirectly.

b. A cognizant agency shall have the following responsibilities:

(1) Ensure that audits are made and reports are received in a timely manner and in accordance with the requirements of this appendix.

(2) Provide technical advice and liaison to State and local governments and independent auditors.

(3) Obtain or make quality control reviews of selected audits made by non-Federal audit organizations, and provide the results, when appropriate, to other interested organizations.

(4) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any reported illegal acts or irregularities. They should also inform State or local law enforcement and prosecuting authorities, if not advised by the recipient, or any violation of law within their jurisdiction.

(5) Advise the recipient of audits that have been found not to have met the requirements set forth in this appendix. In such instances, the recipient will be expected to work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency shall notify the recipient and Federal awarding agencies of the facts and make recommendations for follow-up action. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies for disciplinary action.

(6) Coordinate, to the extent practicable, audits made by or for Federal agencies that are in addition to the audits made pursuant to this appendix, so that the additional audits build upon such audits.

(7) Oversee the resolution of audit findings that affect the programs of more than one agency.

10. *Illegal acts or irregularities.* If the auditor becomes aware of illegal acts or other irregularities, prompt notice shall be given to recipient management officials above the level of involvement. (See also paragraph 11(a)(3) below for the auditor's reporting responsibilities.) The recipient, in turn, shall promptly notify the cognizant agency of the illegal acts or irregularities and of proposed and actual actions, if any. Illegal acts and irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriations of funds or other assets.

11. *Audit Reports.* Audit reports must be prepared at the completion of the audit. Reports serve many needs of State and local governments as well as meeting the requirements of the Single Audit Act.

a. The audit report shall state that the audit was made in accordance with the provisions of this appendix. The report shall be made up of at least:

(1) The auditor's report on financial statements and on a schedule of Federal assistance; the financial statements; and a schedule of Federal assistance, showing the total expenditures for each Federal assistance program as identified in the *Catalog of Federal Domestic Assistance.* Federal programs or grants that have not been assigned a catalog number shall be identified under the caption "other Federal assistance."

(2) The auditor's report on the study and evaluation of internal control systems must identify the organization's significant internal accounting controls, and those controls designed to provide reasonable assurance that Federal programs are being managed in compliance with laws and regulations. It must also identify the controls that were evaluated, the controls that were not evaluated, and the material weaknesses identified as a result of the evaluation.

(3) The auditor's report on compliance containing:

—A statement of positive assurance with respect to those items tested for compliance, including compliance with law and regulations pertaining to financial reports and claims for advances and reimbursements;

—Negative assurance on those items not tested;

—A summary of all instances of noncompliance; and

—An identification of total amounts questioned, if any, for each Federal assistance award, as a result of noncompliance.

b. The three parts of the audit report may be bound into a single report, or presented at the same time as separate documents.

c. All fraud abuse, or illegal acts or indications of such acts, including all questioned costs found as the result of these acts that auditors become aware of, should normally be covered in a separate written report submitted in accordance with paragraph 11f.

d. In addition to the audit report, the recipient shall provide comments on the findings and recommendations in the report, including a plan for corrective action taken or planned and comments on the status of corrective action taken on prior findings. If corrective action is not necessary, a statement describing the reason it is not should accompany the audit report.

e. The reports shall be made available by the State or local government for public inspection within 30 days after the completion of the audit.

f. In accordance with generally accepted government audit standards, reports shall be submitted by the auditor to the organization audited and to those requiring or arranging for the audit. In addition, the recipient shall submit copies of the reports to each Federal department or agency that provided Federal assistance funds to the recipient. Subrecipients shall submit copies to recipients that provided them Federal assistance funds. The reports shall be sent within 30 days after the completion of the audit, but no later than one year after the end of the audit period unless a longer period is agreed to with the cognizant agency.

g. Recipients of more than $100,000 in Federal funds shall submit one copy of the audit report within 30 days after issuance to a central clearinghouse to be designated by the Office of Management and Budget. The clearinghouse will keep completed audits on file and follow up with State and local governments that have not submitted required audit reports.

h. Recipients shall keep audit reports on file for three years from their issuance.

12. *Audit Resolution.* As provided in paragraph 9, the cognizant agency shall be responsible for monitoring the resolution of audit findings that affect the programs of more than one Federal agency. Resolution of findings that relate to the programs of a single Federal agency will be the responsibility of the recipient and that agency. Alternate arrangements may be made on a case-by-case basis by agreement among the agencies concerned.

Resolution shall be made within six months after receipt of the report by the Federal departments and agencies. Corrective action should proceed as rapidly as possible.

13. *Audit workpapers and reports.* Workpapers and reports shall be retained for a minimum of three years from the date of the audit report, unless the auditor is notified in writing by the cognizant agency to extent the retention period. Audit workpapers shall be made available upon request to the cognizant agency or its designee or the General Accounting Office, at the completion of the audit.

14. *Audit Costs.* The cost of audits made in accordance with the provisions of this appendix are allowable charges to Federal assistance programs.

a. The charges may be considered a direct cost or an allocated indirect cost, determined in accordance with the provisions of 34 CFR Part 74, Appendix C, "Principles for Determining Costs Applicable to Grants and Contracts with State and Local Governments.'

b. Generally, the percentage of costs charged to Federal assistance programs for a single audit shall not exceed the percentage that Federal funds expended represent of total funds expended by the recipient during the fiscal year. The percentage may be exceeded, however, if appropriate documentation demonstrates higher actual cost.

15. *Sanctions.* The Single Audit Act provides that no cost may be charged to Federal assistance programs for audits required by the Act that are not made in accordance with this appendix. In cases of continued inability or unwillingness to have a proper audit, Federal agencies must consider other appropriate sanctions including:

—Withholding a percentage of assistance payments until the audit is completed satisfactorily,

—Withholding or disallowing overhead costs, and

—Suspending the Federal assistance agreement until the audit is made.

16. *Auditor Selection.* In arranging for audit services State and local governments shall follow the procurement standards prescribed by 34 CFR Part 74, Subpart P, "Procurement Standards." The standards provide that while recipients are encouraged to enter into intergovermental agreements for audit and other services, analysis should be made to determine whether it would be more economical to purchase the services from private firms. In instances where use of such intergovernmental agreements are required by State statutes (e.g., audit services) these statutes will take precedence.

17. *Small and Minority Audit Firms.* Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this appendix. Recipients of Federal assistance shall take the following steps to further this goal:

a. Assure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals are used to the fullest extent practicable.

b. Make information on forthcoming opportunities available and arrange timeframes for the audit so as to encourage and facilitate participation by small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

c. Consider in the contract process whether firms competing for larger audits intend to subcontract with small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

d. Encourage contracting with small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals which have traditionally audited government programs and, in such cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities.

e. Encourage contracting with consortiums of small audit firms as described in paragraph (a) above when a contract is too large for an individual small audit firm or audit firm owned and controlled by socially and economically disadvantaged individuals.

f. Use the services and assistance, as appropriate, of such organizations as the Small Business Administration, in the solicitation and utilization of small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals.

ATTACHMENT TO APPENDIX

Definition of Major Program as Provided in Pub. L. 98-502

"Major Federal Assistance Program," for State and local governments having Federal assistance expenditures between $100,000 and $100,000,000, means any program for which Federal expenditures during the applicable year exceed the larger of $300,000, or 3 percent of such total expenditures.

Where total expenditures of Federal assistance exceed $100,000,000, the following criteria apply:

Total expenditures of Federal financial assistance for all programs		Major Federal assistance program means any program that exceeds
More than	But less than	
$100 million	$1 billion	$3 million.
$1 billion	$2 billion	$4 million.
$2 billion	$3 billion	$7 million.
$3 billion	$4 billion	$10 million.
$4 billion	$5 billion	$13 million.
$5 billion	$6 billion	$16 million.
$6 billion	$7 billion	$19 million.
Over $7 billion		$20 million.

[50 FR 37358, Sept. 13, 1985. Redesignated at 53 FR 8072, Mar. 11, 1988]

PART 81—GENERAL EDUCATION PROVISIONS ACT—ENFORCEMENT

Subpart A—General Provisions

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APPENDIX TO PART 81—ILLUSTRATIONS OF PROPORTIONALITY

AUTHORITY: 20 U.S.C. 1221e-3(a)(1), 1234-1234i, 3474(a), unless otherwise noted.

SOURCE: 54 FR 19512, May 5, 1989, unless otherwise noted.

Subpart A—General Provisions

§ 81.1 Purpose.

The regulations in this part govern the enforcement of legal requirements under applicable programs administered by the Department of Education and implement Part E of the General Education Provisions Act (GEPA).

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.2 Definitions.

The following definitions apply to the terms used in this part:

Administrative Law Judge (ALJ) means a judge appointed by the Secretary in accordance with section 451 (b) and (c) of GEPA.

Applicable program means any program for which the Secretary of Education has administrative responsibility, except a program authorized by—

(a) The Higher Education Act of 1965, as amended;

(b) The Act of September 30, 1950 (Pub. L. 874, 81st Congress), as amended; or

(c) The Act of September 23, 1950 (Pub. L. 815, 81st Congress), as amended.

Department means the United States Department of Education.

Disallowance decision means the decision of an authorized Departmental official that a recipient must return funds because it made an expenditure of funds that was not allowable or otherwise failed to discharge its obligation to account properly for funds. Such a decision, referred to as a "preliminary departmental decision" in section 452 of GEPA, is subject to review by the Office of Administrative Law Judges.

Party means either of the following:

(a) A recipient that appeals a decision.

(b) An authorized Departmental official who issues a decision that is appealed.

Recipient means the recipient of a grant or cooperative agreement under an applicable program.

Secretary means the United States Secretary of Education.

(Authority: 20 U.S.C. 1221e-3(a)(1); 1234 (b), (c), and (f)(1); 1234a(a)(1); 1234i; 3474(a))

§ 81.3 Jurisdiction of the Office of Administrative Law Judges.

(a) The Office of Administrative Law Judges (OALJ) established under section 451(a) of GEPA has jurisdiction to conduct the following proceedings concerning an applicable program:

(1) Hearings for recovery of funds.

(2) Withholding hearings.

(3) Cease and desist hearings.

(b) The OALJ also has jurisdiction to conduct other proceedings designated by the Secretary. If a proceeding or class of proceedings is so designated, the Department publishes a notice of the designation in the FEDERAL REGISTER.

(Authority: 5 U.S.C. 554, 20 U.S.C. 1234(a))

§ 81.4 Membership and assignment to cases.

(a) The Secretary appoints Administrative Law Judges as members of the OALJ.

(b) The Secretary appoints one of the members of the OALJ to be the chief judge. The chief judge is responsible for the efficient and effective administration of the OALJ.

(c) The chief judge assigns an ALJ to each case or class of cases within the jurisdiction of the OALJ.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234 (b) and (c), 3474(a))

§ 81.5 Authority and responsibility of an Administrative Law Judge.

(a) An ALJ assigned to a case conducts a hearing on the record. The ALJ regulates the course of the proceedings and the conduct of the parties to ensure a fair, expeditious, and economical resolution of the case in accordance with applicable law.

(b) An ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(c) An ALJ is disqualified in any case in which the ALJ has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or the party's attorney as to make it improper for the ALJ to be assigned to the case.

(d)(1) An ALJ may disqualify himself or herself at any time on the basis of the standards in paragraph (c) of this section.

(2) A party may file a motion to disqualify an ALJ under the standards in paragraph (c) of this section. A motion to disqualify must be accompanied by an affidavit that meets the requirements of 5 U.S.C. 556(b). Upon the filing of such a motion and affidavit, the ALJ decides the disqualification

matter before proceeding further with the case.

(Authority: 5 U.S.C. 556(b); 20 U.S.C. 1221e-3(a)(1); 1234(d), (f)(1), and (g)(1); 3474(a))

§ 81.6 Hearing on the record.

(a) A hearing on the record is a process for the orderly presentation of evidence and arguments by the parties.

(b) Except as otherwise provided in this part or in a notice of designation under § 81.3(b), an ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless—

(1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or

(2) The ALJ determines, after reviewing all appropriate submissions, that oral argument is needed to clarify the issues in the case.

(c) At a party's request, the ALJ shall confer with the parties in person or by conference telephone call before determining whether an evidentiary hearing or an oral argument is needed.

(Authority: 5 U.S.C. 556(d); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.7 Non-party participation.

(a) A person or organization, other than a party, that wishes to participate in a case shall file an application to participate with the ALJ assigned to the case. The application must—

(1) Identify the case in which participation is sought;

(2) State how the applicant's interest relates to the case;

(3) State how the applicant's participation would aid in the disposition of the case; and

(4) State how the applicant seeks to participate.

(b) The ALJ may permit an applicant to participate if the ALJ determines that the applicant's participation—

(1) Will aid in the disposition of the case;

(2) Will not unduly delay the proceedings; and

(3) Will not prejudice the adjudication of the parties' rights.

(c) If the ALJ permits an applicant to participate, the ALJ permits the applicant to file briefs.

(d) (1) In addition to the participation described in paragraph (c) of this section, the ALJ may permit the applicant to participate in any or all of the following ways:

(i) Submit documentary evidence.

(ii) Participate in an evidentiary hearing afforded the parties.

(iii) Participate in an oral argument afforded the parties.

(2) The ALJ may place appropriate limits on an applicant's participation to ensure the efficient conduct of the proceedings.

(e) A non-party participant shall comply with the requirements for parties in § 81.11 and § 81.12.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.8 Representation.

A party to, or other participant in, a case may be represented by counsel.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.9 Location of proceedings.

(a) An ALJ may hold conferences of the parties in person or by conference telephone call.

(b) Any conference, hearing, argument, or other proceeding at which the parties are required to appear in person is held in the Washington, DC metropolitan area unless the ALJ determines that the convenience and necessity of the parties or their representatives requires that it be held elsewhere.

(Authority: 5 U.S.C. 554(b); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.10 Ex parte communications.

A party to, or other participant in, a case may not communicate with an ALJ on any fact in issue in the case or on any matter relevant to the merits of the case unless the parties are given notice and an opportunity to participate.

(Authority: 5 U.S.C. 554(d)(1), 557(d)(1)(A); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.11 Motions.

(a) To obtain an order or a ruling from an ALJ, a party shall make a motion to the ALJ.

(b) Except for a request for an extension of time, a motion must be made in writing unless the parties appear in person or participate in a conference telephone call. The ALJ may require a party to reduce an oral motion to writing.

(c) If a party files a motion, the party shall serve a copy of the motion on the other party on the filing date by hand-delivery or by mail.

(d) Except for a request for an extension of time, the ALJ may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. However, the ALJ may deny a motion without awaiting a response.

(e) The date of service of a motion is determined by the standards for determining a filing date in § 81.12(d).

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.12 Filing requirements.

(a) Any written submission to an ALJ or the OALJ under this part must be filed by hand-delivery or by mail.

(b) If a party files a brief or other document with an ALJ or the OALJ, the party shall serve a copy of the filed material on the other party on the filing date by hand-delivery or by mail.

(c) Any written submission to an ALJ or the OALJ must be accompanied by a statement certifying the date that the filed material was filed and served on the other party.

(d) (1) The filing date for a written submission to an ALJ or the OALJ is either—

(i) The date of hand-delivery; or

(ii) The date of mailing.

(2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next business day.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.13 Mediation.

(a) Voluntary mediation is available for proceedings that are pending before the OALJ.

(b) A mediator must be independent of, and agreed to by, the parties to the case.

(c) A party may request mediation by filing a motion with the ALJ assigned to the case. The OALJ arranges for a mediator if the parties to the case agree to mediation.

(d) A party may terminate mediation at any time. Mediation is limited to 120 days unless the mediator informs the ALJ that—

(1) The parties are likely to resolve some or all of the dispute; and

(2) An extension of time will facilitate an agreement.

(e) The ALJ stays the proceedings during mediation.

(f) (1) Evidence of conduct or statements made during mediation is not admissible in any proceeding under this part. However, evidence that is otherwise discoverable may not be excluded merely because it was presented during mediation.

(2) A mediator may not disclose, in any proceeding under this part, information acquired as a part of his or her official mediation duties that relates to any fact in issue in the case or any matter relevant to the merits of the case.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1) and (h), 3474(a))

§ 81.14 Settlement negotiations.

(a) If the parties to a case file a joint motion requesting a stay of the proceedings for settlement negotiations or the approval of a settlement agreement, the ALJ grants the stay.

(b) Evidence of conduct or statements made during settlement negotiations is not admissible in any proceeding under this part. However, evidence that is otherwise discoverable may not be excluded merely because it was presented during settlement negotiations.

(c) The parties may not disclose the contents of settlement negotiations to the ALJ. If the parties enter into a settlement agreement and file a joint motion to dismiss the case, the ALJ grants the motion.

(Authority: 20 U.S.C. 554(c)(1), 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.15 Evidence.

(a) The Federal Rules of Evidence do not apply to proceedings under this part. However, the ALJ accepts only evidence that is—

(1) Relevant;

(2) Material;

(3) Not unduly repetitious; and

(4) Not inadmissible under § 81.13 or § 81.14.

(b) The ALJ may take official notice of facts that are generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(Authority: 5 U.S.C. 556 (d) and (e); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.16 Discovery.

(a) The parties to a case are encouraged to exchange relevant documents and information voluntarily.

(b) The ALJ, at a party's request, may order compulsory discovery described in paragraph (c) of this section if the ALJ determines that—

(1) The order is necessary to secure a fair, expeditious, and economical resolution of the case;

(2) The discovery requested is likely to elicit relevant information with respect to an issue in the case;

(3) The discovery request was not made primarily for the purposes of delay or harassment; and

(4) The order would serve the ends of justice.

(c) If a compulsory discovery is permissible under paragraph (b) of this section, the ALJ may order a party to do one or more of the following:

(1) Make relevant documents available for inspection and copying by the party making the request.

(2) Answer written interrogatories that inquire into relevant matters.

(3) Have depositions taken.

(d) The ALJ may issue a subpoena to enforce an order described in this section and may apply to the appropriate court of the United States to enforce the subpoena.

(e) The ALJ may not compel the discovery of information that is legally privileged.

(f) (1) The ALJ limits the period for discovery to not more than 90 days but may grant an extension for good cause.

(2) At a party's request, the ALJ may set a specific schedule for discovery.

(Authority: 20 U.S.C. 1234(f)(1) and (g))

§ 81.17 Privileges.

The privilege of a person or governmental organization not to produce documents or provide information in a proceeding under this part is governed by the principles of common law as interpreted by the courts of the United States.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.18 The record.

(a) The ALJ arranges for any evidentiary hearing or oral argument to be recorded and transcribed and the transcript made available to the parties upon request at no charge.

(b) The record of a hearing on the record consists of—

(1) All papers filed in the proceeding;

(2) Documentary evidence admitted by the ALJ;

(3) The transcript of any evidentiary hearing or oral argument; and

(4) Rulings, orders, and subpoenas issued by the ALJ.

(Authority: 5 U.S.C. 556(e), 557(c); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.19 Costs and fees of parties.

The Equal Access to Justice Act, 5 U.S.C. 504, applies by its terms to proceedings under this part. Regulations under that statute are in 34 CFR Part 21.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f), 3474(a))

Subpart B—Hearings for Recovery of Funds

§ 81.20 Basis for recovery of funds.

(a) Subject to the provisions of § 81.21, an authorized Departmental official requires a recipient to return funds to the Department if—

(1) The recipient made an unallowable expenditure of funds under a grant or cooperative agreement; or

(2) The recipient otherwise failed to discharge its obligation to account properly for funds under a grant or cooperative agreement.

(b) An authorized Departmental official may base a decision to require a recipient to return funds upon an audit report, an investigative report, a monitoring report, or any other evidence.

(Authority: 20 U.S.C. 1234a(a) (1) and (2))

§ 81.21 Measure of recovery.

A recipient that made an unallowable expenditure or otherwise failed to discharge its obligation to account properly for funds shall return an amount that—

(a) Meets the standards for proportionality in § 81.22;

(b) In the case of a State or local educational agency, excludes any amount attributable to mitigating circumstances under the standards in § 81.23; and

(c) Excludes any amount expended in a manner not authorized by law more than five years before the recipient received the notice of a disallowance decision under § 81.24.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(k), 1234b (a) and (b), 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21622, May 19, 1989]

§ 81.22 Proportionality.

(a)(1) A recipient that made an unallowable expenditure or otherwise failed to account properly for funds shall return an amount that is proportional to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which it received the grant or cooperative agreement.

(2) An identifiable Federal interest under paragraph (a)(1) of this section includes, but is not limited to, the following:

(i) Serving only eligible beneficiaries.

(ii) Providing only authorized services or benefits.

(iii) Complying with expenditure requirements and conditions, such as set-aside, excess cost, maintenance of effort, comparability, supplement-not-supplant, and matching requirements.

(iv) Preserving the integrity of planning, application, recordkeeping, and reporting requirements.

(v) Maintaining accountability for the use of funds.

(b) The appendix to this part contains examples that illustrate how the standards for proportionality apply. The examples present hypothetical cases and do not represent interpretations of any actual program statute or regulation.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234b(a) and 3474(a))

§ 81.23 Mitigating circumstances.

(a) A recipient that is a State or local educational agency and that has made an unallowable expenditure or otherwise failed to account properly for funds is not required to return any amount that is attributable to the mitigating circumstances described in paragraph (b), (c), or (d) of this section.

(b) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by erroneous written guidance from the department. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The guidance was provided in response to a specific written request from the recipient that was submitted to the Department at the address provided by notice published in the FEDERAL REGISTER under this section;

(2) The guidance was provided by a Departmental official authorized to provide the guidance, as described by that notice;

(3) The recipient actually relied on the guidance as the basis for the con-

duct that constituted the violation; and

(4) The recipient's reliance on the guidance was reasonable.

(c) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the Department's failure to provide timely guidance. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The recipient in good faith submitted a written request for guidance with respect to the legality of a proposed expenditure or practice;

(2) The request was submitted to the Department at the address provided by notice published in the FEDERAL REGISTER under this section;

(3) The request—

(i) Accurately described the proposed expenditure or practice; and

(ii) Included the facts necessary for the Department's determination of its legality;

(4) The request contained the certification of the chief legal officer of the appropriate State educational agency that the officer—

(i) Examined the proposed expenditure or practice; and

(ii) Believed it was permissible under State and Federal law applicable at the time of the certification;

(5) The recipient reasonably believed the proposed expenditure or practice was permissible under State and Federal law applicable at the time it submitted the request to the Department;

(6) No Departmental official authorized to provide the requested guidance responded to the request within 90 days of its receipt by the Department; and

(7) The recipient made the proposed expenditure or engaged in the proposed practice after the expiration of the 90-day period.

(d) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the recipient's compliance with a judicial decree from a court of competent jurisdiction. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The recipient was legally bound by the decree;

(2) The recipient actually relied on the decree when it engaged in the conduct that constituted the violation; and

(3) The recipient's reliance on the decree was reasonable.

(e) If a Departmental official authorized to provide the requested guidance responds to a request described in paragraph (c) of this section more than 90 days after its receipt, the recipient that made the request shall comply with the guidance at the earliest practicable time.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234b(b), 3474(a))

§ 81.24 Notice of a disallowance decision.

(a) If an authorized Departmental official decides that a recipient must return funds under § 81.20, the official gives the recipient written notice of a disallowance decision. The official sends the notice by certified mail, return receipt requested, or other means that ensure proof of receipt.

(b)(1) The notice must state a prima facie case for the recovery of funds.

(2) For the purpose of this section, a prima facie case is a statement of the law and the facts that, unless rebutted, is sufficient to sustain the conclusion drawn in the notice. The facts may be set out in the notice or in a document that is identified in the notice and available to the recipient.

(3) A statement that the recipient failed to maintain records required by law or failed to allow an authorized representative of the Secretary access to those records constitutes a prima facie case for the recovery of the funds affected.

(i) If the recipient failed to maintain records, the statement must briefly describe the types of records that were not maintained and identify the recordkeeping requirement that was violated.

(ii) If the recipient failed to allow access to records, the statement must briefly describe the recipient's actions that constituted the failure and identify the access requirement that was violated.

(c) The notice must inform the recipient that it may—

(1) Obtain a review of the disallowance decision by the OALJ; and

(2) Request mediation under § 81.13.

(d) The notice must describe—

(1) The time available to apply for a review of the disallowance decision; and

(2) The procedure for filing an application for review.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(a), 3474(a))

§ 81.25 Reduction of claims.

The Secretary or an authorized Departmental official as appropriate may, after the issuance of a disallowance decision, reduce the amount of a claim established under this subpart by—

(a) Redetermining the claim on the basis of the proper application of the law, including the standards for the measure of recovery under § 81.21, to the facts;

(b) Compromising the claim under the Federal Claims Collection Standards in 4 CFR Part 103; or

(c) Compromising the claim under § 81.26, if applicable.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(j), 3474(a); 31 U.S.C. 3711)

§ 81.26 Compromise of claims under General Education Provisions Act.

(a) The Secretary or an authorized Departmental official as appropriate may compromise a claim established under this subpart without following the procedures in 4 CFR Part 103 if—

(1) (i) The amount of the claim does not exceed $200,000; or

(ii) The difference between the amount of the claim and the amount agreed to be returned does not exceed $200,000; and

(2) The Secretary or the official determines that—

(i) The collection of the amount by which the claim is reduced under the compromise would not be practical or in the public interest; and

(ii) The practice that resulted in the disallowance decision has been corrected and will not recur.

(b) Not less than 45 days before compromising a claim under this section, the Department publishes a notice in the FEDERAL REGISTER stating—

(1) The intention to compromise the claim; and

(2) That interested persons may comment on the proposed compromise.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(j), 3474(a))

§ 81.27 Application for review of a disallowance decision.

(a) If a recipient wishes to obtain review of a disallowance decision, the recipient shall file a written application for review with the OALJ.

(b) A recipient shall file an application for review not later than 30 days after the date it receives the notice of a disallowance decision. Upon receipt of a copy of the filed material, the authorized Departmental official who made the disallowance decision provides the ALJ with a copy of any document identified in the notice under § 81.24(b)(2).

(c) An application for review must contain—

(1) A copy of the disallowance decision of which review is sought;

(2) A statement certifying the date the recipient received the notice of that decision;

(3) A short and plain statement of the disputed issues of law and fact, the recipient's position with respect to these issues, and the disallowed funds the recipient contends need not be returned; and

(4) A statement of the facts and the reasons that support the recipient's position.

(d) The ALJ who considers a timely application for review that substantially complies with the requirements of paragraph (c) of this section may permit the recipient to supplement or amend the application with respect to issues that were timely raised. Any requirement to return funds that is not timely appealed becomes the final decision of the Department.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(b)(1), 3474(a))

§ 81.28 Consideration of an application for review.

(a) The ALJ assigned to the case under § 81.4 considers an application for review of a disallowance decision.

(b) The ALJ decides whether the notice of a disallowance decision meets the requirements of § 81.24, as provided by section 451(e) of GEPA.

(1) If the notice does not meet those requirements, the ALJ—

(i) Returns the notice, as expeditiously as possible, to the authorized Departmental official who made the disallowance decision;

(ii) Gives the official the reasons why the notice does not meet the requirements of § 81.24; and

(iii) Informs the recipient of the ALJ's decision by certified mail, return receipt requested.

(2) An authorized Departmental official may modify and reissue a notice that an ALJ returns.

(c) If the notice of a disallowance decision meets the requirements of § 81.24, the ALJ decides whether the application for review meets the requirements of § 81.27.

(1) If the application, including any supplements or amendments under § 81.27(d), does not meet those requirements, the disallowance decision becomes the final decision of the Department.

(2) If the application meets those requirements, the ALJ—

(i) Informs the recipient and the authorized Departmental official that the OALJ has accepted jurisdiction of the case; and

(ii) Schedules a hearing on the record.

(3) The ALJ informs the recipient of the disposition of its application for review by certified mail, return receipt requested. If the ALJ decides that the application does not meet the requirements of § 81.27, the ALJ informs the recipient of the reasons for the decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(e) and (f)(1), 1234a(b), 3474(a))

§ 81.29 Submission of evidence.

(a) The ALJ schedules the submission of the evidence, whether oral or documentary, to occur within 90 days of the OALJ's receipt of an acceptable application for review under § 81.27.

(b) The ALJ may waive the 90-day requirement for good cause.

(Authority: 5 U.S.C. 556(d); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(c), 3474(a))

§ 81.30 Burden of proof.

If the OALJ accepts jurisdiction of a case under § 81.28, the recipient shall present its case first and shall have the burden of proving that the recipient is not required to return the amount of funds that the disallowance decision requires to be returned because—

(a) An expenditure identified in the disallowance decision as unallowable was allowable;

(b) The recipient discharged its obligation to account properly for the funds;

(c) The amount required to be returned does not meet the standards for proportionality in § 81.22;

(d) The amount required to be returned includes an amount attributable to mitigating circumstances under the standards in § 81.23; or

(e) The amount required to be returned includes an amount expended in a manner not authorized by law more than five years before the recipient received the notice of the disallowance decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(b)(3), 1234b(b)(1), 3474(a))

§ 81.31 Initial decision.

(a) The ALJ makes an initial decision based on the record.

(b) The initial decision includes the ALJ's findings of fact, conclusions of law, and reasoning on all material issues.

(c) On the day the ALJ makes the initial decision, the ALJ—

(1) Sends the initial decision to the Secretary; and

(2) Sends the initial decision to each of the parties by hand-delivery or by certified mail, return receipt requested.

(d) For the purpose of this part, "initial decision" includes an ALJ's modified decision after the Secretary's remand of a case.

(Authority: 5 U.S.C. 557(c); 20 U.S.C 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.32 Petition for review of an initial decision.

(a) If a party wishes to obtain the Secretary's review of the initial decision of an ALJ, the party files a petition for review with the OALJ, which sends the petition to the Secretary.

(b) A party shall file a petition for review not later than 30 days after the date it receives the initial decision. The party shall file its petition by hand-delivery or by overnight or express mail.

(c) If a party files a petition for review, the party shall serve a copy of the petition on the other party on the filing date by hand-delivery or by overnight or express mail.

(d) A petition for review must contain—

(1) The identity of the initial decision of which review is sought; and

(2) A statement of the reasons asserted by the party for affirming the initial decision, modifying it, or setting it aside in whole or in part.

(e) (1) A party may respond to a petition for review by filing a statement of its views on the issues raised in the petition with the OALJ not later than 15 days after the date it receives the petition. The OALJ sends the statement to the Secretary.

(2) A party shall serve a copy of its statement of views on the other party on the filing date by hand-delivery or by overnight or express mail.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(e), 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21726, May 19, 1989]

§ 81.33 Review by the Secretary.

(a) The Secretary reviews the initial decision of an ALJ on the petition of a party under § 81.32. An interlocutory decision of an ALJ is not subject to review except as a part of a review of the ALJ's initial decision.

(b) The Secretary's review of an initial decision is based on the record of the case, the initial decision, and any proper submissions of the parties or other participants in the case filed during the review process.

(c) (1) The ALJ's findings of fact, if supported by substantial evidence, are conclusive.

(2) The Secretary, for good cause, may remand the case to the ALJ to take further evidence. The ALJ may make new or modified findings of fact and may modify the initial decision. The new or modified findings, if supported by substantial evidence, are conclusive.

(3) A party may not introduce new evidence after an initial decision unless the Secretary determines that extraordinary circumstances made the introduction of the evidence during the proceeding before the ALJ impossible. If the Secretary permits the introduction of new evidence, the Secretary remands the case to the ALJ.

(d) The Secretary, for good cause, may remand the case to the ALJ for further briefing or for clarification or revision of the initial decision.

(e) (1) If the Secretary modifies or sets aside an initial decision, in whole or in part, the Secretary's decision includes a statement of the reasons that support it.

(2) The Secretary gives a decision to modify, remand, or set aside to the OALJ, which sends the decision to each of the parties by hand-delivery or by mail. If the decision is mailed, the OALJ sends it certified mail, return receipt requested.

(Authority: 5 U.S.C. 557(b); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(d), 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21726, May 19, 1989]

§ 81.34 Final decision of the Department.

(a) The ALJ's initial decision becomes the final decision of the Department 60 days after the recipient receives the ALJ's decision unless the Secretary modifies, sets aside, or remands the decision during the 60-day period.

(b) If the Secretary modifies or sets aside the ALJ's initial decision, the Secretary's decision becomes the final decision of the Department on the date the recipient receives the Secretary's decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(g), 3474(a))

§ 81.35 Collection of claims.

(a) An authorized Departmental official collects a claim established under this subpart by using the standards and procedures in 34 CFR Part 30.

(b) A claim established under this subpart may be collected—

(1) 30 days after a recipient receives notice of a disallowance decision if the recipient fails to file an acceptable application for review under § 81.27; or

(2) On the date of the final decision of the Department under § 81.34 if the recipient obtains review of a disallowance decision.

(c) The Department takes no collection action pending judicial review of a final decision of the Department under section 458 of GEPA.

(d) If a recipient obtains review of a disallowance decision under § 81.28, the Department does not collect interest on the claim for the period between the date of the disallowance decision and the date of the final decision of the Department under § 81.34.

(Authority: 20 U.S.C. 1234(f)(1); 1234a(f)(1) and (2), (i), and (1))

APPENDIX TO PART 81—ILLUSTRATIONS OF PROPORTIONALITY

(1) *Ineligible beneficiaries.* A State uses 15 percent of its grant to meet the special educational needs of children who were migratory, but who have not migrated for more than five years as a Federal program statute requires for eligibility to participate in the program. Result: Recovery of 15 percent of the grant—all program funds spent for the benefit of those children. Although the services were authorized, the children were not eligible to receive them.

(2) *Ineligible beneficiaries.* A Federal program designed to meet the special educational needs of gifted and talented children requires that at least 80 percent of the children served in any project must be identified as gifted or talented. A local educational agency (LEA) conducts a project in which 76 students are identified as gifted or talented and 24 are not. The project was designed and implemented to meet the special educational needs of gifted and talented students. Result: The LEA must return five percent of the project costs. The LEA provided authorized services for a project in which the 76 target students had to constitute at least 80 percent of the total. Thus, the maximum number of non-target students permitted was 19. Project costs relating to the remaining five students must be returned.

(3) *Ineligible beneficiaries.* Same as the example in paragraph (2), except that only 15 percent of the children were identified as gifted or talented. On the basis of the low percentage of these children and other evidence, the authorized Departmental official finds that the project as a whole did not address their special educational needs and was outside the purpose of the statute. Result: The LEA must return its entire award. The difference between the required percentage of gifted and talented children and the percentage actually enrolled is so substantial that, if consistent with other evidence, the official may reasonably conclude the entire grant was misused.

(4) *Ineligible beneficiaries.* Same as the example in paragraph (2), except that 60 percent of the children were identified as gifted or talented, and it is not clear whether the project was designed or implemented to meet the special educational needs of these children. Result: If it is determined that the project was designed and implemented to serve their special educational needs, the LEA must return 25 percent of the project costs. A project that included 60 target children would meet the requirement that 80 percent of the children served be gifted and talented if it included no more than 15 other children. Thus, while the LEA provided authorized services, only 75 percent of the beneficiaries were authorized to participate in the project (60 target children and 15 others). If the authorized Departmental official, after examining all the relevant facts, determines that the project was not designed and implemented to serve the special educational needs of gifted or talented students, the LEA must return its entire award because it did not provide services authorized by the statute.

(5) *Unauthorized activities.* An LEA uses ten percent of its grant under a Federal program that authorizes activities only to meet the special educational needs of educationally deprived children to pay for health services that are available to all children in the LEA. All the children who use the Federally funded health services happen to be educationally deprived, and thus eligible to receive program services. Result: Recovery of ten percent of the grant—all program funds spent for the health services. Although the children were eligible to receive program services, the health services were unrelated to a special educational need and, therefore, not authorized by law.

(6) *Set-aside requirement.* A State uses 22 percent of its grant for one fiscal year under a Federal adult education program to provide programs of equivalency to a certificate of graduation from a secondary school. The adult education program statute restricts

those programs to no more than 20 percent of the State's grant. Result: Two percent of the State's grant must be returned. Although all 22 percent of the funds supported adult education, the State had no authority to spend more than 20 percent on secondary school equivalency programs.

(7) *Set-aside requirement.* A State uses eight percent of its basic State grant under a Federal vocational education program to pay for the excess cost of vocational education services and activities for handicapped individuals. The program statute requires a State to use ten percent of its basic State grant for this purpose. Result: The State must return two percent of its basic State grant, regardless of how it was used. Because the State was required to spend that two percent on services and activities for handicapped individuals and did not do so, it diverted those funds from their intended purposes, and the Federal interest was harmed to that extent.

(8) *Excess cost requirement.* An LEA uses funds reserved for the disadvantaged under a Federal vocational education program to pay for the cost of the same vocational education services it provides to non-disadvantaged individuals. The program statute requires that funds reserved for the disadvantaged must be used to pay only for the supplemental or additional costs of vocational education services that are not provided to other individuals and that are required for disadvantaged individuals to participate in vocational education. Result: All the funds spent on the disadvantaged must be returned. Although the funds were spent to serve the disadvantaged, the funds were available to pay for only the supplemental or additional costs of providing services to the disadvantaged.

(9) *Maintenance-of-effort requirement.* An LEA participates in a Federal program in fiscal year 1988 that requires it to maintain its expenditures from non-Federal sources for program purposes to receive its full allotment. The program statute requires that non-Federal funds expended in the first preceding fiscal year must be at least 90 percent of non-Federal funds expended in the second preceding fiscal year and provides for a reduction in grant amount proportional to the shortfall in expenditures. No waiver of the requirement is authorized. In fiscal year 1986 the LEA spent $100,000 from non-Federal sources for program purposes; in fiscal year 1987, only $87,000. Result: The LEA must return 1/30 of its fiscal year 1988 grant—the amount of its grant that equals the proportion of its shortfall ($3,000) to the required level of expenditures ($90,000). If, instead, the statute made maintenance of expenditures a clear condition of the LEA's eligibility to receive funds and did not provide for a proportional reduction in the grant award, the LEA would be required to return its entire grant.

(10) *Supplanting prohibition.* An LEA uses funds under a Federal drug education program to provide drug abuse prevention counseling to students in the eighth grade. The LEA is required to provide that same counseling under State law. Funds under the Federal program statute are subject to a supplement-not-supplant requirement. Result: All the funds used to provide the required counseling to the eighth-grade students must be returned. The Federal funds did not increase the total amount of spending for program purposes because the counseling would have been provided with non-Federal funds if the Federal funds were not available.

(11) *Matching requirement.* A State receives an allotment of $90,000 for fiscal year 1988 under a Federal adult education program. It expends its full allotment and $8,000 from its own resources for adult education. Under the Federal statute, the Federal share of expenditures for the State's program is 90 percent. Result: The State must return the unmatched Federal funds, or $18,000. Expenditure of a $90,000 Federal allotment required $10,000 in matching State expenditures, $2,000 more than the State's actual expenditures. At a ratio of one State dollar for every nine Federal dollars, $18,000 in Federal funds were unmatched.

(12) *Application requirements.* In order to receive funds under a Federal program that supports a wide range of activities designed to improve the quality of elementary and secondary education, an LEA submits an application to its State educational agency (SEA) for a subgrant to carry out school-level basic skills development programs. The LEA submits its application after conducting an assessment of the needs of its students in consultation with parents, teachers, community leaders, and interested members of the general public. The Federal program statute requires the application and consultation processes. The SEA reviews the LEA's application, determines that the proposed programs are sound and the application is in compliance with Federal law, and approves the application. After the LEA receives the subgrant, it unilaterally decides to use 20 percent of the funds for gifted and talented elementary school students—an authorized activity under the Federal statute. However, the LEA does not consult with interested parties and does not amend its application. Result: 20 percent of the LEA's subgrant must be returned. The LEA had no legal authority to use Federal funds for programs or activities other than those described in its approved application, and its actions with respect to 20 percent of the subgrant not only impaired the integrity of

the application process, but caused significant harm to other Federal interests associated with the program as follows: the required planning process was circumvented because the LEA did not consult with the specified local interests; program accountability was impaired because neither the SEA nor the various local interests that were to be consulted had an opportunity to review and comment on the merits of the gifted and talented program activities, and the LEA never had to justify those activities to them; and fiscal accountability was impaired because the SEA and those various local interests were, in effect, misled by the LEA's unamended application regarding the expenditure of Federal funds.

(13) *Harmless violation.* Under a Federal program, a grantee is required to establish a 15-member advisory council of affected teachers, school administrators, parents, and students to assist in program design, monitoring, and evaluation. Although the law requires at least three student members of the council, a grantee's council contains only two. The project is carried out, and no damage to the project attributable to the lack of a third student member can be identified. Result: No financial recovery is required, although the grantee must take other appropriate steps to come into compliance with the law. The grantee's violation has not measurably harmed a Federal interest associated with the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234b(a), 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21622, May 19, 1989]

PART 82—NEW RESTRICTIONS ON LOBBYING

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APPENDIX A TO PART 82—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 82—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319, Pub. L. 101-121 (31 U.S.C. 1352); 20 U.S.C. 3474.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

SOURCE: 55 FR 6737, 6752, Feb. 26, 1990 (interim) and 55 FR 26200, June 27, 1990 (final), unless otherwise noted.

Subpart A—General

§ 82.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative ageement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in Appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in Appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in Appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in Appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 82.105 Definitions.

For purposes of this part:

(a) *Agency,* as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement: and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 82.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either Subpart B or C.

Subpart B—Activities by Own Employees

§ 82.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 82.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or

adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 82.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 82.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 82.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 82. 300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 82.100(a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 82.110(a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§ 82.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see Appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 82.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 82.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 82.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 82.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see Appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 82.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

APPENDIX A TO PART 82—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

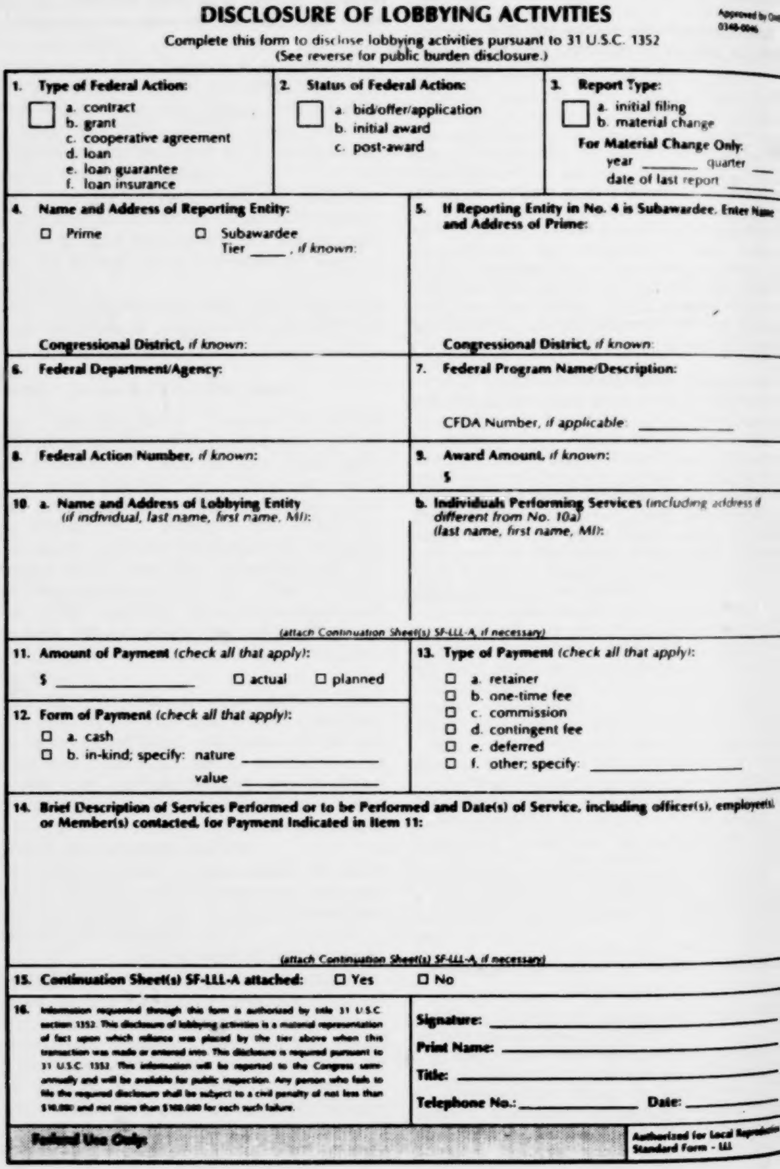
The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United

States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 82—DISCLOSURE FORM TO REPORT LOBBYING



DISCLOSURE OF LOBBYING ACTIVITIES

Approved by O
0348-004

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action:
☐
a. contract
b. grant
c. cooperative agreement
d. loan
e. loan guarantee
f. loan insurance

2. Status of Federal Action:
☐
a. bid/offer/application
b. initial award
c. post-award

3. Report Type:
☐
a. initial filing
b. material change
For Material Change Only:
year ________ quarter ___
date of last report ______

4. Name and Address of Reporting Entity:
☐ Prime ☐ Subawardee
Tier _____, *if known:*

Congressional District, *if known:*

5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:

Congressional District, *if known:*

6. Federal Department/Agency:

7. Federal Program Name/Description:

CFDA Number, *if applicable:* ____________

8. Federal Action Number, *if known:*

9. Award Amount, *if known:*
$

10. a. Name and Address of Lobbying Entity
(if individual, last name, first name, MI):

b. Individuals Performing Services *(including address if different from No. 10a)*
(last name, first name, MI):

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. Amount of Payment *(check all that apply):*
$ ________________ ☐ actual ☐ planned

12. Form of Payment *(check all that apply):*
☐ a. cash
☐ b. in-kind; specify: nature __________________
value __________________

13. Type of Payment *(check all that apply):*
☐ a. retainer
☐ b. one-time fee
☐ c. commission
☐ d. contingent fee
☐ e. deferred
☐ f. other; specify: ____________________

14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Signature: ____________________
Print Name: ____________________
Title: ____________________
Telephone No.: ______________ **Date:** ________

Federal Use Only:

Authorized for Local Reprodu
Standard Form - LLL

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.

2. Identify the status of the covered Federal action.

3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.

4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.

5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.

6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.

7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.

8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."

9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.

10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).

11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.

12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.

13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.

14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.

15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.

16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

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PART 85—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

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APPENDIX A TO PART 85—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

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APPENDIX C TO PART 85—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

AUTHORITY: E.O. 12549; Sec. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D 41 U.S.C. 701 et seq); 20 U.S.C. 3474, 1221e-3(a)(1).

SOURCE: 53 FR 19191 and 19204, May 26, 1988, unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 55 FR 21679, May 25, 1990.

Subpart A—General

§ 85.100 Purpose.

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Except as provided in § 85.200, Debarment or Suspension, § 85.201, Treatment of Title IV, HEA participation, and § 85.215, Exception provision, debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of Executive Order 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the Executive Order by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of "ineligible" in § 85.105(i)), and participants who have voluntarily excluded themselves from participation in covered transactions

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19191, May 26, 1988]

§ 85.105 Definitions.

(a) *Adequate evidence.* Information sufficient to support the reasonable belief that a particular act or omission has occurred.

(b) *Affiliate.* Persons are affiliates of each another if, directly or indirectly, either one controls or has the power to control the other, *or*, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

(c) *Agency.* Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

(d) *Civil judgment.* The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801-12).

(e) *Conviction.* A judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

(f) *Debarment.* An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is "debarred."

(g) *Debarring official.* An official authorized to impose debarment. The debarring official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(h) *Indictment.* Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

(i) *Ineligible.* Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for exemple, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

(j) *Legal proceedings.* Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State of local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

(k) *Nonprocurement List.* The portion of the *List of Parties Excluded from Federal Procurement or Nonprocurement Programs* complied, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(l) *Notice.* A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

(m) *Participant.* Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

(n) *Person.* Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

(o) *Preponderance of the evidence.* Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(p) *Principal.* Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators.

(q) *Proposal.* A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

(r) *Respondent.* A person against whom a debarment or suspension action has been initiated.

(s) *State.* Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

(t) *Suspending official.* An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(u) *Suspension.* An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is "suspended."

(v) *Voluntary exclusion or voluntarily excluded.* A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

(w) *ED.* The U.S. Department of Education.

(Authority: E.O. 12549; 20 U.S.C. 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19192, May 26, 1988]

§ 85.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as "covered transactions."

(1) *Covered transaction.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(*1*) Principal investigators.

(*2*) Providers of federally-required audit services.

(2) *Exceptions.* The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action," § 85.200, "Debarment or suspension," sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in § 85.110(a). Sections 85.325, "Scope of debarment," and 85.420, "Scope of suspension," govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal procurement activities.* Debarment and suspension of Federal procurement contractors and subcontractors under Federal procurement contracts are covered by the Federal Acquisition Regulation (FAR), 48 CFR Subpart 9.4.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(Authority: E.O. 12549; 20 U.S.C. 3474)

Subpart B—Effect of Action

§ 85.200 Debarment or suspension.

(a) *Primary covered transactions.* Except to the extent prohibited by law and subject to § 85.201, Treatment of Title IV, HEA participation, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the executive branch of the Federal Government for the period of their debarment or suspension. Accordingly, ED shall not enter into primary covered transactions with such debarred or suspended persons during such period, except as permitted pursuant to § 85.215.

(b) *Lower tier covered transactions.* Except to the extent prohibited by law and subject to § 85.210, Treatment of Title IV, HEA participation, persons who have been debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transaction (see § 85.110(a)(1)(ii)) for the period of their debarment or suspension. Such persons shall also be excluded from all contracts to provide federally-required audit services regardless of contract amount.

(c) *Exceptions.* Debarment or suspension does not affect a person's eligibility for:

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19192, May 26, 1988]

§ 85.201 Treatment of Title IV, HEA participation.

(a)(1) The debarment of an educational institution under E.O. 12549 pursuant to procedures that comply with 5 U.S.C. 554-557 (formal adjudication requirements under the Administrative Procedures Act) terminates the institution's eligibility to participate in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended, for the duration of the debarment.

(2)(i) The suspension of an educational institution under E.O. 12549 pursuant to procedures that comply with 5 U.S.C. 554-557 suspends the institution's eligibility to participate in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended.

(ii) The suspension of Title IV eligibility lasts for a period of 60 days, beginning on the date of the suspending official's decision, except that it may last longer if the institution and the Secretary agree to an extension or if the Secretary initiates a limitation or termination proceeding against the institution under 34 CFR Part 668, Subpart G, prior to the 60th day.

(b)(1) Except as provided in paragraph (a) of this section, the debarment, suspension, proposed debarment, or proposed suspension of an educational institution or lender under E.O. 12549 does not affect the eligibility of the institution or lender to participate in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended.

(2)(i) The Secretary initiates a debarment or suspension proceeding under § 85.316 or § 85.414, respectively, against an educational institution that is suspended or debarred under E.O. 12549 by ED or another Federal agency if the procedures used did not comply with 5 U.S.C. 554.557.

(ii) The Secretary conducts an audit or program review of any lender that is debarred or suspended by ED or another Federal agency, to determine whether grounds exist for the initiation of a fine, limitation, suspension, or termination action against the lender under 34 CFR Part 668, Subpart G.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19192, May 26, 1988]

§ 85.205 Ineligible persons.

Persons who are ineligible, as defined in § 85.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.210 Voluntary exclusion.

Persons who accept voluntary exclusions under § 85.315 are excluded in accordance with the terms of their settlements. ED shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.215 Exception provision.

ED may grant an exception permitting a debarred, suspended, or voluntarily excluded person to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and § 85.200 of this rule. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with § 85.505(a).

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Except as provided in § 85.201, Treatment of Title IV, HEA participation, and § 85.215, Exception provision, the Secretary shall not, and participants shall not, renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, ineligible or voluntary excluded.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19192, May 26, 1988]

§ 85.225 Failure to adhere to restrictions.

Except as permitted under § 85.215 or § 85.220 of these regulations, a participant shall not knowingly do business under a covered transaction with a person who is debarred or suspended, or with a person who is ineligible for or voluntarily excluded from that covered transaction. Violation of this restriction may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies, as appropriate. A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction (see Appendix B), unless it knows that the certification is erroneous. An agency has the burden of proof that such participant did knowingly do business with such a person.

(Authority: E.O. 12549; 20 U.S.C. 3474)

Subpart C—Debarment

§ 85.300 General.

The debarring official may debar a person for any of the causes in § 85.305, using procedures established in §§ 85.310 through 85.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 85.300 through 85.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR Subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 85.215 or § 85.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided

that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 85.315 or of any settlement of a debarment or suspension action

(5) Violation of any requirement of Subpart F of this part, relating to providing a drug-free workplace, as set forth in § 85.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

(Authority: E.O. 12549; 20 U.S.C. 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 54 FR 4950 and 4960, Jan. 31, 1989 and 55 FR 21699, May 25, 1990]

§ 85.310 Procedures.

ED shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§ 85.311 through 85.314.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.312 Notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under § 85.305 for proposing debarment;

(d) Of the provisions of § 85.311 through § 85.314, and any other ED procedures, if applicable, governing debarment decisionmaking; and

(e) Of the potential effect of a debarment.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(b) *Additional proceedings as to disputed material facts.* (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c) (1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in § 85.215 or the debarment or suspension is against—

(A) An educational institution under procedures that do not meet the requirements of § 85.201(a); or

(B) A lender participating in the Title IV, Part B, HEA program.

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19192, May 26, 1988]

§ 85.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, ED may, at any time, settle a debarment or suspension action.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see Subpart E).

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.316 Procedures for Title IV, HEA debarments.

(a)(1) If the Secretary debars an educational institution under E.O. 12549, the Secretary uses the following procedures in connection with the debarment to ensure that the debarment also precludes participation under Title IV of the Higher Education Act of 1965, as amended:

(i) The procedures in § 85.312, Notice of proposed debarment, and § 85.314(d), Notice of debarring official's decision.

(ii) Instead of the procedures in § 85.313 and § 85.314(a)-(c), the procedures in 34 CFR Part 668, Subpart G.

(2) An administrative law judge shall act as the debarring official for proceeding under this section.

(b) On appeal from a decision debarring an educational institution, the Secretary issues a final decision after all parties have filed their written materials with the Secretary.

(c) In such a proceeding, in addition to the findings and conclusions required by 34 CFR Part 668, Subpart G, the debarring official, and, on appeal, the Secretary, determine whether there exist sufficient grounds for debarment as set forth in § 85.305.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19192, May 26, 1988]

§ 85.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of Subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of Subpart F of this part (*see* § 85.305(c)(5)), the period of debarment shall not exceed five years.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of §§ 85.311 through 85.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarring official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

(Authority: E.O. 12549; 20 U.S.C. 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 54 FR 4950 and 4960, Jan. 31, 1989 and 55 FR 21699, May 25, 1990]

§ 85.325 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see §§ 85.311 through 85.314).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(Authority: E.O. 12549; 20 U.S.C. 3474)

Subpart D—Suspension

§ 85.400 General.

(a) The suspending official may suspend a person for any of the causes in § 85.405 using procedures established in §§ 85.410 through 85.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in § 85.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 85.400 through 85.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in § 85.305(a); or

(2) That a cause for debarment under § 85.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.410 Procedures.

(a) *Investigation and referral.* Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) *Decisionmaking process.* ED shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in §§ 85.411 through 85.413.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under § 85.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of §§ 85.411 through 85.413 and any other ED procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.412 Opportunity to contest suspension.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(b) *Additional proceedings as to disputed material facts.* (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see § 85.320(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) *No additional proceedings necessary.* In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.414 Procedures for Title IV, HEA suspensions under E.O. 12549.

(a) *Title IV E.O. 12549 suspensions.* (1) If the Secretary suspends an educational institution under E.O. 12549, the Secretary uses the following procedures in connection with the suspension to ensure that the suspension also precludes participation under Title IV of the Higher Education Act of 1965, as amended:

(i) The procedures in § 85.411, Notice of suspension.

(ii) Instead of the procedures in §§ 85.412, 85.413, and 85.415, the procedures in 34 CFR Part 668, Subpart G.

(2) An administrative law judge shall act as the suspending official for proceeding under this section.

(3) In such a proceeding, in addition to the findings and conclusions required by 34 CFR Part 668, Subpart G, the suspending official, and, on appeal, the Secretary, determine whether there exist sufficient grounds for suspension under E.O. 12549 as set forth in § 85.405.

(b) *Continued assistance under Title IV, HEA.* The institution may continue its participation in the Title IV programs until the procedures described in paragraph (a) of this section, except for those relating to appeals to the Secretary, have been completed, unless the Secretary takes an emergency action under 34 CFR Part 668, Subpart G.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19193, May 26, 1988]

§ 85.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see § 85.325), except that the procedures of §§ 85.410 through 85.413 shall be used in imposing a suspension.

(Authority: E.O. 12549; 20 U.S.C. 3474)

Subpart E—Responsibilities of GSA, ED and Participants

§ 85.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.505 ED responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which ED has granted exceptions under § 85.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in § 85.500(b) and of the exceptions granted under § 85.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) ED officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel. #).

(e) ED officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in Appendix A to this Part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the Nonprocurement List for its principals (Tel. #). Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.* (1) Each participant shall require participants in lower tier covered transactions to include the certification in Appendix B to this Part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligiblity of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel. #).

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to ED if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

(Authority: E.O. 12549; 20 U.S.C. 3474)

Subpart F—Drug-Free Workplace Requirements (Grants)

SOURCE: 55 FR 21688, 21699, May 25, 1990, unless otherwise noted.

EFFECTIVE DATE NOTE: At 55 FR 21688, 21699, May 25, 1990, subpart F to part 85 was revised, effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date. For the convenience of the user, the superseded text follows the new text.

§ 85.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2

§ 85.605 Definitions.

(a) Except as amended in this section, the definitions of § 85.105 apply to this subpart.

(b) For purposes of this subpart—

(1) *Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) *Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) *Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All *direct charge* employees;

(ii) All *indirect charge* employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces);

(6) *Federal agency* or *agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management governmentwide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§ 85.610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§ 85.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certification under § 85.630;

(b) With respect to a grantee other than an individual—

(1) The grantee has violated the certification by failing to carry out the requirements of paragraphs (A)(a)-(g) and/or (B) of the certification (Alternate I to Appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual—

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to Appendix C); or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§ 85.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in § 85.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (*see* § 85.320(a)(2) of this part).

§ 85.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 85.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in Appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until July 31, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(1) If a State elects to make one certification in each Federal fiscal year as specified in paragraph (c) of this section it must forward its certification to: Office of Intergovernmental and Interagency Affairs.

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until July 31, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(i) If a State agency elects to make one certification in each Federal fiscal year as specified in paragraph (d) of this section it must forward its certification to: Office of Intergovernmental and Interagency Affairs.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

[55 FR 21688, 21699, May 25, 1990, as amended at 55 FR 21699, May 25, 1990]

§ 85.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(i) A grantee must report convictions as specified in paragraph (a)(1) of this section to the Director, Grants and Contracts Service, Office of Management.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(1) A grantee must report convictions as specified in paragraph (b) of this section to the Director, Grants and Contracts Service, Office of Management.

(Approved by the Office of Management and Budget under control number 0991-0002)

[55 FR 21688, 21699, May 25, 1990, as amended at 55 FR 21699, May 25, 1990]

EFFECTIVE DATE NOTE: At 55 FR 21688, 21699, May 25, 1990, subpart F to part 85 was revised, effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date. For the convenience of the user, the superseded text of subpart F follows.

Subpart F—Drug-Free Workplace Requirements (Grants)

SOURCE: 54 FR 4950 and 4960, Jan. 31, 1989, unless otherwise noted.

§ 85.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR Subparts 9.4, 23.5, and 52.2.

§ 85.605 Definitions.

(a) Except as amended in this section, the definitions of § 85.105 apply to this subpart.

(b) For purposes of this subpart—

(1) "Controlled substance" means a controlled substance in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1300.11 through 1300.15.

(2) "Conviction" means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) "Criminal drug statute" means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use or possession of any controlled substance;

(4) "Drug-free workplace" means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance;

(5) "Employee" means the employee of a grantee directly engaged in the performance of work pursuant to the provisions of the grant;

(6) "Federal agency" or "agency" means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) "Grant" means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management government-wide regulation ("Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments"). The term does not include technical assistance which provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) "Grantee" means a person who applies for or receives a grant directly from a Federal agency;

(9) "Individual" means a natural person.

§ 85.610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

(c) The provisions of Subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§ 85.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certificaiton under § 85.630;

(b) The grantee has violated the certification by failing to carry out the requirements of subparagraphs (A.)(a)-(g) of the certification for grantees other than individuals (Alternate I to Appendix C) or by failing to carry out the requirements of the certification for grantees who are individuals (Alternate II to Appendix C); or

(c) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

§ 85.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in § 85.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (*see* § 85.320(a)(2) of this part).

§ 85.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 85.630 Grantees' responsibilities.

(a) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the agency, as provided in Appendix C to this part.

(b) Except as provided in this paragraph, a grantee shall make the required certification for each grant. A grantee that is a State may elect to submit an annual certification to each Federal agency from which it obtains grants in lieu of certifications for each grant during the year covered by the certification.

(c) Grantees are not required to provide a certification in order to continue receiving funds under a grant awarded before the effective date of this subpart or under a no-cost time extension of any grant.

APPENDIX A TO PART 85—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause of default.

4. The prospective primary participant shall privide immediate written notice to the department or agency to whom this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transac-

tion, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State of local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

APPENDIX B TO PART 85—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILTY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter

into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

APPENDIX C TO PART 85—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

Controlled substance means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15);

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All *direct charge* employees; (ii) All *indirect charge* employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces).

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (Grantees Other Than Individuals)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under paragraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under paragraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

____

____

____

Check ☐ if there are workplaces on file that are not identified here.

Alternate II. (Grantees Who Are Individuals)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant;

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

[55 FR 21690, 21699, May 25, 1990]

EFFECTIVE DATE NOTE: At 55 FR 21690, 21699, May 25, 1990, Appendix C to part 85 was revised, effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date. For the convenience of the user, the superseded text follows.

APPENDIX C TO PART 85—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance was placed when the agency determined to award the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

Certification Regarding Drug-Free Workplace Requirements

Alternate I

A. The grantee certifies that it will provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing a drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;

(e) Notifying the agency within ten days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction;

(f) Taking one of the following actions, within 30 days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee shall insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

____

____

____

Alternate II

The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

[54 FR 4950 and 4960, Jan. 31, 1989]

PART 98—STUDENT RIGHTS IN RESEARCH, EXPERIMENTAL PROGRAMS, AND TESTING

Sec.

98.1 Applicability of part.
98.2 Definitions.
98.3 Access to instructional material used in a research or experimentation program.
98.4 Protection of students' privacy in examination, testing, or treatment.

Sec.
98.5 Information and investigation office.
98.6 Reports.
98.7 Filing a complaint.
98.8 Notice of the complaint.
98.9 Investigation and findings.
98.10 Enforcement of the findings.

Authority: Sec. 514(a) of Pub. L. 93-380, 88 Stat. 574 (20 U.S.C. 1232h(a)); sec. 1250 of Pub. L. 95-561, 92 Stat. 2355-2356 (20 U.S.C. 1232h(b)); and sec. 408(a)(1) of Pub. L. 90-247, 88 Stat. 559-560, as amended (20 U.S.C. 1221e-3(a)(1)); sec. 414(a) of Pub. L. 96-88, 93 Stat. 685 (20 U.S.C. 3474(a)), unless otherwise noted.

Source: 49 FR 35321, Sept. 6, 1984, unless otherwise noted.

§ 98.1 Applicability of part.

This part applies to any program administered by the Secretary of Education that:

(a)(1) Was transferred to the Department by the Department of Education Organization Act (DEOA); and

(2) Was administered by the Education Division of the Department of Health, Education, and Welfare on the day before the effective date of the DEOA; or

(b) Was enacted after the effective date of the DEOA, unless the law enacting the new Federal program has the effect of making section 439 of the General Education Provisions Act inapplicable.

(c) The following chart lists the funded programs to which Part 98 does not apply as of February 16, 1984.

Name of program	Authorizing statute	Implementing regulations
1. High School Equivalency Program and College Assistance Migrant Program.	Section 418A of the Higher Education Act of 1965 as amended by the Education Amendments of 1980 (Pub. L. 96-374) 20 U.S.C. 1070d-2).	Part 206.
2. Programs administered by the Commissioner of the Rehabilitative Services Administration.	The Rehabilitation Act of 1973 as amended by Pub. L. 95-602 (29 U.S.C. 700, et seq.).	Parts 351-356, 361, 362, 365, 366, 369-375, 378, 379, 385-390, and 395.
3. College housing	Title IV of the Housing Act of 1950 as amended (12 U.S.C. 1749, et seq.).	Part 614.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1230, 1232h, 3487, 3507)

§ 98.2 Definitions.

(a) The following terms used in this part are defined in 34 CFR Part 77: "Department," "Recipient," "Secretary."

(b) The following definitions apply to this part: "Act" means the General Education Provisions Act.

Office means the information and investigation office specified in § 98.5.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 98.3 Access to instructional material used in a research or experimentation program.

(a) All instructional material—including teachers' manuals, films, tapes, or other supplementary instructional material—which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project.

(b) For the purpose of this part "research or experimentation program or project" means any program or project in any program under § 98.1 (a) or (b) that is designed to explore or develop new or unproven teaching methods or techniques.

(c) For the purpose of the section "children" means persons not above age 21 who are enrolled in a program under § 98.1 (a) or (b) not above the elementary or secondary education level, as determined under State law.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232h(a))

§ 98.4 Protection of students' privacy in examination, testing, or treatment.

(a) No student shall be required, as part of any program specified in § 98.1 (a) or (b), to submit without prior consent to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning one or more of the following:

(1) Political affiliations;

(2) Mental and psychological problems potentially embarrassing to the student or his or her family;

(3) Sex behavior and attitudes;

(4) Illegal, anti-social, self-incriminating and demeaning behavior;

(5) Critical appraisals of other individuals with whom the student has close family relationships;

(6) Legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or

(7) Income, other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under a program.

(b) As used in paragraph (a) of this section, "prior consent" means:

(1) Prior consent of the student, if the student is an adult or emancipated minor; or

(2) Prior written consent of the parent or guardian, if the student is an unemancipated minor.

(c) As used in paragraph (a) of this section:

(1) "Psychiatric or psychological examination or test" means a method of obtaining information, including a group activity, that is not directly related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs or feelings; and

(2) "Psychiatric or psychological treatment" means an activity involving the planned, systematic use of methods or techniques that are not directly related to academic instruction and that is designed to affect behavioral, emotional, or attitudinal characteristics of an individual or group.

(Authority: 20 U.S.C. 1232h(b))

§ 98.5 Information and investigation office.

(a) The Secretary has designated an office to provide information about the requirements of section 439 of the Act, and to investigate, process, and review complaints that may be filed concerning alleged violations of the provisions of the section.

(b) The following is the name and address of the office designated under paragraph (a) of this section: Family Educational Rights and Privacy Act Office, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, D.C. 20202.

(Authority: 20 U.S.C. 1231e-3(a)(1), 1232h)

§ 98.6 Reports.

The Secretary may require the recipient to submit reports containing information necessary to resolve complaints under section 439 of the Act and the regulations in this part.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232h)

§ 98.7 Filing a complaint.

(a) Only a student or a parent or guardian of a student directly affected by a violation under Section 439 of the Act may file a complaint under this part. The complaint must be submitted in writing to the Office.

(b) The complaint filed under paragraph (a) of this section must—(1) Contain specific allegations of fact giving reasonable cause to believe that a violation of either § 98.3 or § 98.4 exists; and

(2) Include evidence of attempted resolution of the complaint at the local level (and at the State level if a State complaint resolution process exists), including the names of local and State officials contacted and significant dates in the attempted resolution process.

(c) The Office investigates each complaint which the Office receives that meets the requirements of this section to determine whether the recipient or contractor failed to comply with the provisions of section 439 of the Act.

(Approved by the Office of Management and Budget under control number 1880-0507)

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232h)

§ 98.8 Notice of the complaint.

(a) If the Office receives a complaint that meets the requirements of § 98.7, it provides written notification to the complainant and the recipient or contractor against which the violation has been alleged that the complaint has been received.

(b) The notice to the recipient or contractor under paragraph (a) of this section must:

(1) Include the substance of the alleged violation; and

(2) Inform the recipient or contractor that the Office will investigate the complaint and that the recipient or contractor may submit a written response to the complaint.

(Authority: 20 U.S.C. 1221e-3(A)(1), 1232h)

§ 98.9 Investigation and findings.

(a) The Office may permit the parties to submit further written or oral arguments or information.

(b) Following its investigations, the Office provides to the complainant and recipient or contractor written notice of its findings and the basis for its findings.

(c) If the Office finds that the recipient or contractor has not complied with section 439 of the Act, the Office includes in its notice under paragraph (b) of this section:

(1) A statement of the specific steps that the Secretary recommends the recipient or contractor take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the recipient or contractor may comply voluntarily.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232h)

§ 98.10 Enforcement of the findings.

(a) If the recipient or contractor does not comply during the period of time set under § 98.9(c), the Secretary may either:

(1) For a recipient, take an action authorized under 34 CFR Part 78, including:

(i) Issuing a notice of intent to terminate funds under 34 CFR 78.21;

(ii) Issuing a notice to withhold funds under 34 CFR 78.21, 200.94(b), or 298.45(b), depending upon the applicable program under which the notice is issued; or

(iii) Issuing a notice to cease and desist under 34 CFR 78.31, 200.94(c) or 298.45(c), depending upon the program under which the notice is issued; or

(2) For a contractor, direct the contracting officer to take an appropriate action authorized under the Federal Acquisition Regulations, including either:

(i) Issuing a notice to suspend operations under 48 CFR 12.5; or

(ii) Issuing a notice to terminate for default, either in whole or in part under 48 CFR 49.102.

(b) If, after an investigation under § 98.9, the Secretary finds that a recipient or contractor has complied voluntarily with section 439 of the Act, the Secretary provides the complainant and the recipient or contractor written notice of the decision and the basis for the decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1232h)

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

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99.63 Where are complaints filed?
99.64 What is the complaint procedure?
99.65 What is the content of the notice of complaint issued by the Office?
99.66 What are the responsibilities of the Office in the enforcement process?
99.67 How does the Secretary enforce decisions?

AUTHORITY: Sec. 438, Pub. L. 90-247, Title IV, as amended, 88 Stat. 571-574 (20 U.S.C. 1232g).

SOURCE: 53 FR 11943, Apr. 11, 1988, unless otherwise noted.

Subpart A—General

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) This part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary of Education that:

(1)(i) Was transferred to the Department under the Department of Education Organization Act (DEOA); and

(ii) Was administered by the Commissioner of Education on the day before the effective date of the DEOA; or

(2) Was enacted after the effective date of the DEOA, unless the law enacting the new Federal program has the effect of making section 438 of the General Education Provisions Act inapplicable.

(Authority: 20 U.S.C. 1230, 1232g, 3487, 3507)

(b) The following chart lists the funded programs to which Part 99 does not apply as of April 11, 1988:

Name of program	Authorizing statute	Implementing regulations
1. High School Equivalency Program and College Assistance Migrant Program.	Section 418A of the Higher Education Act of 1965 as amended by the Education Amendments of 1980 (Pub. L. 96-374) 20 U.S.C. 1070d-2).	Part 206.
2. Programs administered by the Commissioner of the Rehabilitation Services Administration, and the Director of the National Institute on Disability and Rehabilitation Research.	The Rehabilitation Act of 1973, as amended. (29 U.S.C. 700, *et seq.*).	Parts 350–359, 361, 365, 366, 369–371, 373–375, 378, 379, 385–390, and 395.
3. Transition program for refugee children	Immigration and Nationality Act, as amended by the Refugee Act of 1980, Pub. L. 96-212 (8 U.S.C. 1522(d)).	Part 538.

Name of program	Authorizing statute	Implementing regulations
4. College Housing	Title IV of the Housing Act of 1950, as amended (12 U.S.C. 1749, *et seq.*).	Part 614.
5. The following programs administered by the Assistant Secretary for Educational Research and Improvement: Educational Research Grant Program. Regional Educational Laboratories Research and Development Centers. All other research or statistical activities funded under Section 405 or 406 of the General Education Provisions Act.	Section 405 of the General Education Provisions Act (20 U.S.C. 1221e), and section 406 of the General Education Provisions Act (20 U.S.C. 1221-1).	Parts 700, 706-708.

NOTE: The Secretary, as appropriate, updates the information in this chart and informs the public.

(c) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(d) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section—

(1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or

(2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(e) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 438 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

(NOTE: 34 CFR 300.560-300.576 contain requirements regarding confidentiality of information relating to handicapped children who receive benefits under the Education of the Handicapped Act.)

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

Act means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 438 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

Attendance includes, but is not limited to:

(a) Attendance in person or by correspondence; and

(b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

Directory information means information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Disclosure means to permit access to or the release, transfer, or other communication of education records, or the personally indentifiable information contained in those records, to any party, by any means, including oral, written, or electronic means.

(Authority: 20 U.S.C. 1232g(b)(1))

Educational agency or institution means any public or private agency or institution to which this part applies under § 99.1(a).

(Authority: 20 U.S.C. 1232g(a)(3))

Education records (a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;

(2) Records of a law enforcement unit of an educational agency or institution, but only if education records maintained by the agency or institution are not disclosed to the unit, and the law enforcement records are:

(i) Maintained separately from education records;

(ii) Maintained solely for law enforcement purposes; and

(iii) Disclosed only to law enforcement officials of the same jurisdiction;

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

(Authority: 20 U.S.C. 1232g(a)(4))

Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

Institution of postsecondary education means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

Party means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

Personally identifiable information includes, but is not limited to:

(a) The student's name;

(b) The name of the student's parent or other family member;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable.

(Authority: 20 U.S.C. 1232g)

Record means any information recorded in any way, including, but not limited to, handwriting, print, tape, film, microfilm, and microfiche.

(Authority: 20 U.S.C. 1232g)

Secretary means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C. 1232g)

Student, except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

(Authority: 20 U.S.C. 1232g(a)(6))

§ 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C. 1232g)

§ 99.5 What are the rights of eligible students?

(a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) If an individual is or has been in attendance at one component of an educational agency or institution, that attendance does not give the individual rights as a student in other components of the agency or institution to which the individual has applied for admission, but has never been in attendance.

(Authority: 20 U.S.C. 1232g(d))

§ 99.6 What information must an educational agency's or institution's policy contain?

(a) Each educational agency or institution shall adopt a policy regarding how the agency or institution meets the requirements of the Act and of this part. The policy must include:

(1) How the agency or institution informs parents and students of their rights, in accord with § 99.7;

(2) How a parent or eligible student may inspect and review education records under § 99.10, including at least:

(i) The procedure the parent or eligible student must follow to inspect and review the records;

(ii) With an understanding that it may not deny access to education records, a description of the circumstances in which the agency or institution believes it has a legitimate cause to deny a request for a copy of those records;

(iii) A schedule of fees (if any) to be charged for copies; and

(iv) A list of the types and locations of education records maintained by the agency or institution, and the titles and addresses of the officials responsible for the records;

(3) A statement that personally identifiable information will not be released from an education record without the prior written consent of the parent or eligible student, except under one or more of the conditions described in § 99.31;

(4) A statement indicating whether the educational agency or institution

has a policy of disclosing personally identifiable information under § 99.31(a)(1), and , if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest;

(5) A statement that a record of disclosures will be maintained as required by § 99.32, and that a parent or eligible student may inspect and review that record;

(6) A specification of the types of personally identifiable information the agency or institution has designated as directory information under § 99.37; and

(7) A statement that the agency or institution permits a parent or eligible student to request correction of the student's education records under § 99.20, to obtain a hearing under § 99.21(a), and to add a statement to the record under § 99.21(b)(2).

(b) The educational agency or institution shall state the policy in writing and make a copy of it available on request to a parent or eligible student.

(Approved by the Office of Management and Budget under control number 1880-0508)

(Authority: 20 U.S.C. 1232g(e) and (f))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988]

§ 99.7 What must an educational agency or institution include in its annual notification?

(a) Each educational agency or institution shall annually notify parents of students currently in attendance, and eligible students currently in attendance, at the agency or institution of their rights under the Act and this part. The notice must include a statement that the parent or eligible student has a right to:

(1) Inspect and review the student's education records;

(2) Request the amendment of the student's education records to ensure that they are not inaccurate, misleading, or otherwise in violation of the student's privacy or other rights;

(3) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and the regulations in this part authorize disclosure without consent;

(4) File with the U.S. Department of Education a complaint under § 99.64 concerning alleged failures by the agency or institution to comply with the requirements of the act and this part; and

(5) Obtain a copy of the policy adopted under § 99.6.

(b) The notice provided under paragraph (a) of this section must also indicate the places where copies of the policy adopted under § 99.6 are located.

(c) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents and eligible students of their rights.

(d) An agency or institution of elementary or secondary education shall effectively notify parents of students who have a primary or home language other than English.

(Approved by the Office of Management and Budget under control number 1880-0508)

(Authority: 20 U.S.C. 1232g(e))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988]

Subpart B—What are the Rights of Inspection and Review of Education Records?

§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under § 99.12, each educational agency or institution shall permit a parent or eligible student to inspect and review the education records of the student.

(b) The educational agency or institution shall comply with a request for access to records within a reasonable period of time, but in no case more than 45 days after it has received the request.

(c) The educational agency or institution shall respond to reasonable requests for explanations and interpretations of the records.

(d) The educational agency or institution shall give the parent or eligible student a copy of the records if failure to do so would effectively prevent the parent or student from exercising the right to inspect and review the records.

(e) The educational agency or institution shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of "Education records" in § 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C. 1232g(a)(1)(A))

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C. 1232g(a)(1))

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect, review, or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are:

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if:

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's:

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if:

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall:

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1) (A) and (B))

Subpart C—What are the Procedures for Amending Education Records?

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy or other rights, he or she may ask the educational agency or institution to amend the record.

(b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988]

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy or other rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, it shall:

(i) Amend the record accordingly; and

(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall:

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C. 1232g(a)(2))

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

(Authority: 20 U.S.C. 1232g(a)(2))

Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

§ 99.30 Under what conditions must an educational agency or institution obtain prior consent to disclose information?

(a) Except as provided in § 99.31, an educational agency or institution shall obtain a signed and dated written consent of a parent or an eligible student before it discloses pesonally identifiable information from the student's education records.

(b) The written consent must:

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section:

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

(Authority: 20 U.S.C. 1232g (b)(1) and (b)(2)(A))

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of:

(i) The Comptroller General of the United States;

(ii) The Secretary; or

(iii) State and local educational authorities.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to:

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, "financial aid" means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(1)(D))

(5)(i) The disclosure is to State and local officials or authorities, if a State statute adopted before November 19, 1974, specifically requires disclosure to those officials and authorities.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to:

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) The agency or institution may disclose information under paragraph (a)(6)(i) of this section only if:

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted.

(iii) For the purposes of paragraph (a)(6) of this section, the term "organization" includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information", under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(b) This section does not forbid or require an educational agency or institution to disclose personally identifiable information from the education records of a student to any parties under paragraphs (a) (1) through (11) of this section.

(Authority: 20 U.S.C. 1232g (a)(5)(A), (b)(1) and (b)(2)(B))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988]

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include:

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(b) If an educational agency or institution discloses personally identifiable information from an education record with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include:

(1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(2) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.

(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to:

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(1);

(3) A party with written consent from the parent or eligible student; or

(4) A party seeking directory information.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

(Approved by the Office of Management and Budget under control number 1880-0508)

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if:

(1) The disclosures meet the requirements of § 99.31; and

(2) The educational agency or institution has complied with the requirements of § 99.32(b).

(c) Paragraph (a) of this section does not apply to disclosures of directory information under § 99.31(a)(11) or to disclosures to a parent or student under § 99.31(a)(12).

(d) Except for disclosures under § 99.31(a) (11) and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(Authority: 20 U.S.C. 1232g(b)(4)(B))

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a)(2) shall:

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless:

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The policy of the agency or institution under § 99.6 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under Subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if:

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(b)(1)(B))

§ 99.35 What conditions apply to disclosure of information for Federal o State program purposes?

(a) The officials listed i § 99.31(a)(3) may have access to education records in connection with a audit or evaluation of Federal or Stat supported education programs, or fo the enforcement of or compliance wit Federal legal requirements whic relate to those programs.

(b) Information that is collecte under paragraph (a) of this sectio must:

(1) Be protected in a manner tha does not permit personal identificatio of individuals by anyone except the officials referred to in paragraph (a) o this section; and

(2) Be destroyed when no longe needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section doe not apply if:

(1) The parent or eligible studen has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C. 1232g(b)(3))

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Paragraph (a) of this section shall be strictly construed.

(Authority: 20 U.S.C. 1232g(b)(1)(I))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988]

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without meeting the conditions in paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(a)(5) (A) and (B))

Subpart E—What are the Enforcement Procedures?

§ 99.60 What functions has the Secretary delegated to the Office and to the Education Appeal Board?

(a) For the purposes of this subpart, "Office" means the Family Policy and Regulations Office, U.S. Department of Education.

(b) The Secretary designates the Office to:

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Education Appeal Board to act as the Review Board required under the Act.

(Authority: 20 U.S.C. 1232g (f) and (g), 1234)

§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C. 1232g(f))

§ 99.62 What information must an educational agency or institution submit to the Office?

The Office may require an educational agency or institution to submit reports containing information necessary to resolve complaints under the Act and the regulations in this part.

(Authority: 20 U.S.C. 1232g (f) and (g))

§ 99.63 Where are complaints filed?

A person may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy and Regulations Office, U.S. Department of Education, Washington, DC 20202.

(Authority: 20 U.S.C. 1232g(g))

§ 99.64 What is the complaint procedure?

(a) A complaint filed under § 99.63 must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred.

(b) The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part.

(Authority: 20 U.S.C. 1232g(f))

§ 99.65 What is the content of the notice of complaint issued by the Office?

(a) If the Office receives a complaint, it notifies the complainant and the educational agency or institution against which the violation has been alleged, in writing, that the complaint has been received.

(b) The notice to the agency or institution under paragraph (a) of this section:

(1) Includes the substance of the alleged violation; and

(2) Informs the agency or institution that the Office will investigate the complaint and that the educational agency or institution may submit a written response to the complaint.

(Authority: 20 U.S.C. 1232g(g))

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews the complaint and response and may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant and the educational agency or institution written notice of its findings and the basis for its findings.

(c) If the Office finds that the educational agency or institution has not complied with the Act or this part, the notice under paragraph (b) of this section:

(1) Includes a statement of the specific steps that the agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

(Authority: 20 U.S.C. 1232g(f))

§ 99.67 How does the Secretary enforce decisions?

(a) If the eductional agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may take an action authorized under 34 CFR Part 78, including:

(1) Issuing a notice of intent to terminate funds under 34 CFR 78.21;

(2) Issuing a notice to withhold funds under 34 CFR 78.21, 200.94(b) or 298.45(b), depending upon the applicable program under which the notice is issued; or

(3) Issuing a notice to cease and desist under 34 CFR 78.31, 200.94(c) or 298.45(c), depending upon the program under which the notice is issued.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.

(NOTE: 34 CFR Part 78 contains the regulations of the Education Appeal Board.)

(Authority: 20 U.S.C. 1232g(g))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988]

Subtitle B—Regulations of the Offices of the Department of Education

CHAPTER I—OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION

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PART 100—NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF EDUCATION EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

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APPENDIX A—FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

APPENDIX B—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

AUTHORITY: Sec. 602, 78 Stat. 252; 42 U.S.C. 2000d-1, unless otherwise noted.

SOURCE: 45 FR 30918, May 9, 1980, unless otherwise noted.

§ 100.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the "Act") to the end that no person in the United States shall; on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Education.

(Authority: Sec. 601, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d)

§ 100.2 Application of this regulation.

This regulation applies to any program for which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal assisted programs and activities listed in Appendix A of this regulation. It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of the regulation pursuant to an application approved prior to such effective date. This regulation does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended before the effective date of this regulation, (c) the use of any assistance by any individual who is the ultimate beneficiary under any such program, or (d) any employment practice, under any such program, of any employer, employment agency, or labor organization, except to the extent described in § 100.3. The fact that a type of Federal assistance is not listed in Appendix A shall not mean, if Title VI of the Act is otherwise applicable, that a program is not covered. Federal financial assistance under statutes now in force or hereinafter enacted may be added to this list by notice published in the FEDERAL REGISTER.

(Authority: Secs. 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253; 42 U.S.C. 2000d-1 2000d-3)

§ 100.3 Discrimination prohibited.

(a) *General.* No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) *Specific discriminatory actions prohibited.* (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) In determining the site or location of a facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

(4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6) (i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the competitive labor market. The following, under existing laws, have one of the above objectives as a primary objective:

(A) Projects under the Public Works Acceleration Act, Pub. L. 87-658, 42 U.S.C. 2641-2643.

(B) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371-1374.

(C) Programs assisted under laws listed in Appendix A as respects employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments.

(D) Assistance to rehabilitation facilities under the Vocational Rehabilitation Act, 29 U.S.C. 32-34, 41a and 41b.

(2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

(d) *Indian Health and Cuban Refugee Services.* An individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program limited by Federal law to individuals of a particular race, color, or national origin different from his.

(e) *Medical emergencies.* Notwithstanding the foregoing provisions of this section, a recipient of Federal financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if immediate provision of a service or other benefit to an individual is necessary to prevent his death or serious impairment of his health, and such service or other benefit cannot be provided except by or through a medical institution which refuses or fails to comply with paragraph (a) of this section.

(Authority: Sec. 601, 602, 604, Civil Rights Act of 1964; 78 Stat. 252, 253, 42 U.S.C. 2000d, 2000d-1, 2000d-3)

§ 100.4 Assurances required.

(a) *General.* (1) Every application for Federal financial assistance to carry out a program to which this part applies, except a program to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. In the case of an application for Federal financial assistance to provide real property or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case of personal property the assurance shall obligate the recipient for the period during which he retains ownership or possession of the property. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. The responsible Department official shall specify the form of the foregoing assurances for each program, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants in the program. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) Where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government the instrument effecting or recording the transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property is involved but property is improved with Federal financial assistance, the recipient shall agree to include such a covenant to any subsequent transfer of the property. Where the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Department official, such a condition and right of reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In the event a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on such property for the purposes for which the property was transferred, the responsible Department official may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

(b) *Continuing State programs.* Every application by a State or a State agency to carry out a program involving continuing Federal financial assistance to which this regulation applies (including the Federal financial assistance listed in Part 2 of Appendix A) shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this regulation, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.

(c) *Elementary and secondary schools.* The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the responsible Department official determines is adequate to accomplish the purposes of the Act and this part, at the earliest practicable time, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the responsible Department official may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and the regulations in this part. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of such order.

(d) *Assurance from institutions.* (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training project, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. If in any such case the assistance sought is for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1. Sec. 182; 80 Stat. 1209; 42 U.S.C. 2000d-5)

§ 100.5 Illustrative application.

The following examples will illustrate the programs aided by Federal financial assistance of the Department. (In all cases the discrimination prohibited is discrimination on the ground of race, color, or national origin prohibited by Title VI of the Act and this regulation, as a condition of the receipt of Federal financial assistance).

(a) In federally-affected area assistance (Pub. L. 815 and Pub. L. 874) for construction aid and for general support of the operation of elementary or secondary schools, or in more limited support to such schools such as for the acquisition of equipment, the provision of vocational education, or the provision of guidance and counseling services, discrimination by the recipient school district in any of its elementary or secondary schools in the admission of students, or in the treatment of its students in any aspect of the educational process, is prohibited. In this and the following illustrations the prohibition of discrimination in the treatment of students or other trainees includes the prohibition of discrimination among the students or trainees in the availability or use of any academic, dormitory, eating, recreational, or other facilities of the grantee or other recipient.

(b) In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students in the graduate school is prohibited, and the prohibition extends to the entire university unless it satisfies the responsible Department official that practices with respect to other parts or programs of the university will not interfere, directly or indirectly, with fulfillment of the assurance required with respect to the graduate school.

(c) In a training grant to a hospital or other nonacademic institution, discrimination is prohibited in the selection of individuals to be trained and in their treatment by the grantee during their training. In a research or demonstration grant to such an institution discrimination is prohibited with respect to any educational activity and any provision of medical or other services and any financial aid to individuals incident to the program.

(d) In grants to assist in the construction of facilities for the provision of health, educational or welfare services, assurances will be required that services will be provided without discrimination, to the same extent that discrimination would be prohibited as a condition of Federal operating grants for the support of such services. Thus, as a condition of grants for the construction of academic, research, or other facilities at institutions of higher education, assurances will be required that there will be no discrimination in the admission or treatment of students. In construction grants the assurances required will be adapted to the nature of the activities to be conducted in the facilities for construction of which the grants have been authorized by Congress.

(e) Upon transfers of real or personal surplus property for educational uses, discrimination is prohibited to the same extent as in the case of grants for the construction of facilities or the provision of equipment for like purposes.

(f) Each applicant for a grant for the construction of educational television facilities is required to provide an assurance that it will, in its broadcast services, give due consideration to the interests of all significant racial or ethnic groups within the population to be served by the applicant.

(g) A recipient may not take action that is calculated to bring about indirectly what this regulation forbids it to accomplish directly. Thus, a State, in selecting or approving projects or sites for the construction of public libraries which will receive Federal financial assistance, may not base its selections or approvals on criteria which have the effect of defeating or of substantially impairing accomplishments of the objectives of the Federal assistance as respects individuals of a particular race, color or national origin.

(h) In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 100.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in paragraph (i) of § 100.3(b)(6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served.

(i) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1)

§ 100.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

(Approved by the Office of Management and Budget under control number 1870-0500)

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1)

[45 FR 30918, May 9, 1980, as amended at 53 FR 49143, Dec. 6, 1988]

§ 100.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 100.8.

(2) If an investigation does not warrant action pursuant to paragraph (1) of this paragraph (d) the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1)

§ 100.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 100.4.* If an applicant fails or refuses to furnish an assurance required under § 100.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

(Authority: Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1. Sec. 182, 80 Stat. 1209; 42 U.S.C. 2000d-5)

§ 100.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 100.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 100.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5-8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee considered to be on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided for by this part, may be reimbursed for his travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or Joint Hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 100.10.

(Authority: Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1)

§ 100.10 Decisions and notices.

(a) *Decisions by hearing examiners.* After a hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the hearing examiner, the applicant or recipient or the counsel for the Department may, within the period provided for in the rules of procedure issued by the responsible Department official, file with the reviewing authority exceptions to the initial decision, with his reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision thereof including the reasons therefor. In the absence of exceptions the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of a hearing examiner pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 100.9(a) the reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing examiner or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraphs (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review such a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), (c) of this section shall become the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with § 100.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of § 100.4(c), and provides reasonable assurance that it will comply with the court order or plan.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

(Authority: Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1)

§ 100.11 Judicial review.

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

(Authority: Sec. 603, 78 Stat. 253; 42 U.S.C. 2000d-2)

§ 100.12 Effect on other regulations, forms and instructions.

(a) *Effect on other regulations.* All regulations, orders, or like directions heretofore issued by any officer of the Department which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this regulation applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this regulation, except that nothing in this regulation shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this regulation. Nothing in this regulation, however, shall be deemed to supersede any of the following (including future amendments thereof):

(1) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions, insofar as such Order, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this regulation is inapplicable, or prohibit discrimination on any other ground; or (2) requirements for Emergency School Assistance as published in 35 FR 13442 and codified as 34 CFR, Part 280.

(b) *Forms and instructions.* The responsible Department official shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part.

(c) *Supervision and coordination.* The responsible Department official may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of Title VI of the Act and this regulation (other than responsibility for review as provided in § 100.10(e)), including the achievements of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of Title VI and this regulation to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or Agency acting pursuant to an assignment of responsibility under this section shall have the same effect as though such action had been taken by the responsible official of this Department.

(Authority: Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1)

§ 100.13 Definitions.

As used in this part:

(a) The term "Department" means the Department of Education.

(b) The term "Secretary" means the Secretary of Education.

(c) The term "responsible Department official" means the Secretary or, to the extent of any delegation by the Secretary of authority to act in his stead under any one or more provisions of this part, any person or persons to whom the Secretary has heretofore delegated, or to whom the Secretary may hereafter delegate such authority.

(d) The term "reviewing authority" means the Secretary, or any person or persons (including a board or other body specially created for that purpose and also including the responsible Department official) acting pursuant to authority delegated by the Secretary to carry out responsibilities under § 100.10(a)-(d).

(e) The term "United States" means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term "State" means any one of the foregoing.

(f) The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(g) The term "program" includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, rehabilitation, housing, or other services, whether provided through employees of the recipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient, and including work opportunities and cash or loan or other assistance to individuals), or for the provision of facilities for furnishing services, financial aid or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any services, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance, and to include any services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance or such non-Federal resources.

(h) The term "facility" includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(i) The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

(j) The term "primary recipient" means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

(k) The term "applicant" means one who submits an application, request, or plan required to be approved by a Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term "application" means such an application, request, or plan.

(Authority: Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1)

APPENDIX A—FEDERAL FINANCIAL ASSISTANCE TO WHICH THESE REGULATIONS APPLY

Part 1—Assistance other than for State-Administered Continuing Programs

1. Loans for acquisition of equipment for academic subjects, and for minor remodeling (20 U.S.C. 445).

2. Construction of facilities for institutions of higher education (20 U.S.C. 701-758).

3. School Construction in federally-affected and in major disaster areas (20 U.S.C. 631-647).

4. Construction of educational broadcast facilities (47 U.S.C. 390-399).

5. Loan service of captioned films and educational media; research on, and production and distribution of, educational media for the handicapped, and training of persons in the use of such media for the handicapped (20 U.S.C. 1452).

6. Demonstration residential vocational education schools (20 U.S.C. 1321).

7. Research and related activities in education of handicapped children (20 U.S.C. 1441).

8. Educational research, dissemination and demonstration projects; research training; and construction under the Cooperation Research Act (20 U.S.C. 331-332(b)).

9. Research in teaching modern foreign languages (20 U.S.C. 512).

10. Training projects for manpower development and training (42 U.S.C. 2601, 2602, 2610a-2610c).

11. Research and training projects in Vocational Education (20 U.S.C. 1281(a), 1282-1284).

12. Allowances to institutions training NDEA graduate fellows (20 U.S.C. 461-465).

13. Grants for training in librarianship (20 U.S.C. 1031-1033).

14. Grants for training personnel for the education of handicapped children (20 U.S.C. 1431).

15. Allowances for institutions training teachers and related educational personnel in elementary and secondary education, or post-secondary vocational education (20 U.S.C. 1111-1118).

16. Recruitment, enrollment, training and assignment of Teacher Corps personnel (20 U.S.C. 1101-1107a).

17. Operation and maintenance of schools in Federally-affected and in major disaster areas (20 U.S.C. 236-241; 241-1; 242-244).

18. Grants or contracts for the operation of training institutes for elementary or secondary school personnel to deal with special educational problems occasioned by desegregation (42 U.S.C. 2000c-3).

19. Grants for in-service training of teachers and other schools personnel and employment of specialists in desegregation problems (42 U.S.C. 2000c-4).

20. Higher education students loan program (Title II, National Defense Education Act, 20 U.S.C. 421-429).

21. Educational Opportunity grants and assistance for State and private programs of low-interest insured loans and State loans to students in institutions of higher education (Title IV, Higher Education Act of 1965, 20 U.S.C. 1061-1087).

22. Grants and contracts for the conduct of Talent Search, Upward Bound, and Special Services Programs (20 U.S.C. 1068).

23. Land-grant college aid (7 U.S.C. 301-308; 321-326; 328-331).

24. Language and area centers (Title VI, National Defense Education Act, 20 U.S.C. 511).

25. American Printing House for the Blind (20 U.S.C. 101-105).

26. Future Farmers of America (36 U.S.C. 271-391) and similar programs.

27. Science clubs (Pub. L. 85-875, 20 U.S.C. 2, note).

28. Howard University (20 U.S.C. 121-129).

29. Gallaudet College (31 D.C. Code, Chapter 10).

30. Establishment and operation of a model secondary school for the deaf by Gallaudet College (31 D.C. Code 1051-1053; 80 Stat. 1027-1028).

31. Faculty development programs, workshops and institutes (20 U.S.C. 1131-1132).

32. National Technical Institute for the Deaf (20 U.S.C. 681-685).

33. Institutes and other programs for training educational personnel (Parts D, E, and F, Title V, Higher Education Act of 1965) (20 U.S.C. 1119-1119c-4).

34. Grants and contracts for research and demonstration projects in librarianship (20 U.S.C. 1034).

35. Acquisition of college library resources (20 U.S.C. 1021-1028).

36. Grants for strengthening developing institutions of higher education (20 U.S.C. 1051-1054); National Fellowships for teaching at developing institutions (20 U.S.C. 1055), and grants to retired professors to teach at developing institutions (20 U.S.C. 1056).

37. College Work-Study Program (42 U.S.C. 2751-2757).

38. Financial assistance for acquisition of higher education equipment, and minor remodeling (20 U.S.C. 1121-1129).

39. Grants for special experimental demonstration projects and teacher training in adult education (20 U.S.C. 1208).

40. Grant programs for advanced and undergraduate international studies (20 U.S.C. 1171-1176; 22 U.S.C. 2452(b)).

41. Experimental projects for developing State leadership or establishment of special services (20 U.S.C. 865).

42. Grants to and arrangements with State educational and other agencies to meet special educational needs of migratory children of migratory agricultural workers (20 U.S.C. 241e(c)).

43. Grants by the Secretary to local educational agencies for supplementary educational centers and services; guidance, counseling, and testing (20 U.S.C. 841-844; 844b).

44. Resource centers for improvement of education of handicapped children (20 U.S.C. 1421) and centers and services for deaf-blind children (20 U.S.C. 1422).

45. Recruitment of personnel and dissemination of information on education of handicapped (20 U.S.C. 1433).

46. Grants for research and demonstrations relating to physical education or recreation for handicapped children (20 U.S.C. 1442) and training of physical educators and recreation personnel (20 U.S.C. 1434).

47. Dropout prevention projects (20 U.S.C. 887).

48. Bilingual education programs (20 U.S.C. 880b-880b-6).

49. Grants to agencies and organizations for Cuban refugees (22 U.S.C. 2601(b)(4)).

50. Grants and contracts for special programs for children with specific learning disabilities including research and related activities, training and operating model centers (20 U.S.C. 1461).

51. Curriculum development in vocational and technical education (20 U.S.C. 1391).

52. Establishment, including construction, and operation of a National Center on Educational Media and Materials for the Handicapped (20 U.S.C. 1453).

53. Grants and contracts for the development and operation of experimental preschool and early education programs for handicapped (20 U.S.C. 1423).

54. Grants to public or private non-profit agencies to carry on the Follow Through Program in kindergarten and elementary schools (42 U.S.C. 2809 (a)(2)).

55. Grants for programs of cooperative education and grants and contracts for training and research in cooperative education (20 U.S.C. 1087a-1087c).

56. Grants and contracts to encourage the sharing of college facilities and resources (network for knowledge) (20 U.S.C. 1133-1133b).

57. Grants, contracts, and fellowships to improve programs preparing persons for public service and to attract students to public service (20 U.S.C. 1134-1134b).

58. Grants for the improvement of graduate programs (20 U.S.C. 1135-1135c).

59. Contracts for expanding and improving law school clinical experience programs (20 U.S.C. 1136-1136b).

60. Exemplary programs and projects in vocational education (20 U.S.C. 1301-1305).

61. Grants to reduce borrowing cost for construction of residential schools and dormitories (20 U.S.C. 1323).

62. Surplus real and related personal property disposal for educational purposes (40 U.S.C. 484(k)).

Part 2—Continuing Assistance to State Administered Programs

1. Grants to States for public library service and construction, interlibrary cooperation and specialized State library services for certain State institutions and the physically handicapped (20 U.S.C. 351-355).

2. Grants to States for strengthening instruction in academic subjects (20 U.S.C. 441-444).

3. Grants to States for vocational education (20 U.S.C. 1241-1264).

4. Arrangements with State education agencies for training under the Manpower Development and Training Act (42 U.S.C. 2601-2602, 2610a).

5. Grants to States to assist in the elementary and secondary education of children of low-income families (20 U.S.C. 241a-242m).

6. Grants to States to provide for school library resources, textbooks and other instructional materials for pupils and teachers in elementary and secondary schools (20 U.S.C. 821-827).

7. Grants to States to strengthen State departments of education (20 U.S.C. 861-870).

8. Grants to States for community service programs (20 U.S.C. 1001-1011).

9. Grants to States for adult basic education and related research, teacher training and special projects (20 U.S.C. 1201-1211).

10. Grants to States educational agencies for supplementary educational centers and services, and guidance, counseling and testing (20 U.S.C. 841-847).

11. Grants to States for research and training in vocational education (20 U.S.C. 1281(b)).

12. Grants to States for exemplary programs and projects in vocational education (20 U.S.C. 1301-1305).

13. Grants to States for residential vocational education schools (20 U.S.C. 1321).

14. Grants to States for consumer and homemaking education (20 U.S.C. 1341).

15. Grants to States for cooperative vocational educational program (20 U.S.C. 1351-1355).

16. Grants to States for vocational work-study programs (20 U.S.C. 1371-1374).

17. Grants to States to attract and qualify teachers to meet critical teaching shortages (20 U.S.C. 1108-1110c).

18. Grants to States for education of handicapped children (20 U.S.C. 1411-1414).

19. Grants for administration of State plans and for comprehensive planning to determine construction needs of institutions of higher education (20 U.S.C. 715(b)).

APPENDIX B—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

I. SCOPE AND COVERAGE

A. APPLICATION OF GUIDELINES

These Guidelines apply to recipients of any Federal financial assistance from the Department of Education that offer or administer programs of vocational education or training. This includes State agency recipients.

B. DEFINITION OF RECIPIENT

The definition of "recipient" of Federal financial assistance is established by Department regulations implementing Title VI, Title IX, and Section 504 (34 CFR 100.13(i), 106.2(h), 104.3(f).

For the purposes of Title VI:

The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee, or transferee thereof, but such terms does not include any ultimate beneficiary [e.g., students] under any such program. (34 CFR 100.13(i)).

For the purposes of Title IX:

"Recipient" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person to whom Federal financial assistance is extended, directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof (34 CFR 106.2(h)).

For the purposes of Section 504:

"Recipient" means any State or its political subdivision any instrumentality of a State or its political subdivision, any public or private agency, institution, or organization, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. (34 CFR 104.3(f)).

C. EXAMPLES OF RECIPIENTS COVERED BY THESE GUIDELINES

The following education agencies, when they provide vocational education, are examples of recipients covered by these Guidelines:

1. The board of education of a public school district and its administrative agency.

2. The administrative board of a specialized vocational high school serving students from more than one school district.

3. The administrative board of a technical or vocational school that is used exclusively or principally for the provision of vocational education to persons who have completed or left high school (including persons seeking a certificate or an associate degree through a vocational program offered by the school)

and who are available for study in preparation for entering the labor market.

4. The administrative board of a postsecondary institution, such as a technical institute, skill center, junior college, community college, or four year college that has a department or division that provides vocational education to students seeking immediate employment, a certificate or an associate degree.

5. The administrative board of a proprietary (private) vocational education school.

6. A State agency recipient itself operating a vocational education facility.

D. EXAMPLES OF SCHOOLS TO WHICH THESE GUIDELINES APPLY

The following are examples of the types of schools to which these Guidelines apply.

1. A junior high school, middle school, or those grades of a comprehensive high school that offers instruction to inform, orient, or prepare students for vocational education at the secondary level.

2. A vocational education facility operated by a State agency.

3. A comprehensive high school that has a department exclusively or principally used for providing vocational education; or that offers at least one vocational program to secondary level students who are available for study in preparation for entering the labor market; or that offers adult vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market.

4. A comprehensive high school, offering the activities described above, that recieves students on a contract basis from other school districts for the purpose of providing vocational education.

5. A specialized high school used exclusively or principally for the provision of vocational education, that enrolls students form one or more school districts for the purpose of providing vocational education.

6. A technical or vocational school that primarily provides vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market, including students seeking an associate degree or certificate through a course of vocational instruction offered by the school.

7. A junior college, a community college, or four-year college that has a department or division that provides vocational education to students seeking immediate employment, an associate degree or a certificate through a course of vocational instruction offered by the school.

8. A proprietary school, licensed by the State that offers vocational education.

NOTE: Subsequent sections of these Guidelines may use the term *secondary vocational education center* in referring to the institutions described in paragraphs 3, 4 and 5 above or the term *postsecondary vocational education center* in referring to institutions described in paragraphs 6 and 7 above or the term *vocational education center* in referring to any or all institutions described above.

II. RESPONSIBILITIES ASSIGNED ONLY TO STATE AGENCY RECIPIENTS

A. RESPONSIBILITIES OF ALL STATE AGENCY RECIPIENTS

State agency recipients, in addition to complying with all other provisions of the Guidelines relevant to them, may not require, approve of, or engage in any discrimination or denial of services on the basis of race, color, national origin, sex, or handicap in performing any of the following activities:

1. Establishment of criteria or formulas for distribution of Federal or State funds to vocational education programs in the State;

2. Establishment of requirements for admission to or requirements for the administration of vocational education programs;

3. Approval of action by local entities providing vocational education. (For example, a State agency must ensure compliance with Section IV of these Guidelines if and when it reviews a vocational education agency decision to create or change a geographic service area.);

4. Conducting its own programs. (For example, in employing its staff it may not discriminate on the basis of sex or handicap.)

B. STATE AGENCIES PERFORMING OVERSIGHT RESPONSIBILITIES

The State agency responsible for the administration of vocational education programs must adopt a compliance program to prevent, identify and remedy discrimination on the basis of race, color, national origin, sex or handicap by its subrecipients. (A "subrecipient," in this context, is a local agency or vocational education center that receives financial assistance through a State agency.) This compliance program must include:

1. Collecting and analyzing civil rights related data and information that subrecipients compile for their own purposes or that are submitted to State and Federal officials under existing authorities;

2. Conducting periodic compliance reviews of selected subrecipients (i.e., an investigation of a subrecipient to determine whether it engages in unlawful discrimination in any aspect of its program); upon finding unlawful discrimination, notifying the subrecipient of steps it must take to attain compliance and attempting to obtain voluntary compliance;

3. Providing technical assistance upon request to subrecipients. This will include assisting subrecipients to identify unlawful discrimination and instructing them in remedies for and prevention of such discrimination;

4. Periodically reporting its activities and findings under the foregoing paragraphs, including findings of unlawful discrimination under paragraph 2, immediately above, to the Office for Civil Rights.

State agencies are not required to terminate or defer assistance to any subrecipient. Nor are they required to conduct hearings. The responsibilities of the Office for Civil Rights to collect and analyze data, to conduct compliance reviews, to investigate complaints and to provide technical assistance are not diminished or attenuated by the requirements of Section II of the Guidelines.

C. Statement of Procedures and Practices

Within one year from the publication of these Guidelines in final form, each State agency recipient performing oversight responsibilities must submit to the Office for Civil Rights the methods of administration and related procedures it will follow to comply with the requirements described in paragraphs A and B immediately above. The Department will review each submission and will promptly either approve it, or return it to State officials for revision.

III. Distribution of Federal Financial Assistance and Other Funds for Vocational Education

A. Agency Responsibilities

Recipients that administer grants for vocational education must distribute Federal, State, or local vocational education funds so that no student or group of students is unlawfully denied an equal opportunity to benefit from vocational education on the basis of race, color, national origin, sex, or handicap.

B. Distribution of Funds

Recipients may not adopt a formula or other method for the allocation of Federal, State, or local vocational education funds that has the effect of discriminating on the basis of race, color, national origin, sex, or handicap. However, a recipient may adopt a formula or other method of allocation that uses as a factor race, color, national origin, sex, or handicap [or an index or proxy for race, color, national origin, sex, or handicap e.g., number of persons receiving Aid to Families with Dependent Children or with limited English speaking ability] if the factor is included to compensate for past discrimination or to comply with those provisions of the Vocational Education Amendments of 1976 designed to assist specified protected groups.

C. Example of a Pattern Suggesting Unlawful Discrimination

In each State it is likely that some local recipients will enroll greater proportions of minority students in vocational education than the State-wide proportion of minority students in vocational education. A funding formula or other method of allocation that results in such local recipients receiving per-pupil allocations of Federal or State vocational education funds lower than the State-wide average per-pupil allocation will be presumed unlawfully discriminatory.

D. Distribution Through Competitive Grants or Contracts

Each State agency that establishes criteria for awarding competitive vocational education grants or contracts must establish and apply the criteria without regard to the race, color, national origin, sex, or handicap of any or all of a recipient's students, except to compensate for past discrimination.

E. Application Processes for Competitive or Discretionary Grants

State agencies must disseminate information needed to satisfy the requirements of any application process for competitive or discretionary grants so that all recipients, including those having a high percentage of minority or handicapped students, are informed of and able to seek funds. State agencies that provide technical assistance for the completion of the application process must provide such assistance without discrimination against any one recipient or class of recipients.

F. Alteration of Fund Distribution to Provide Equal Opportunity

If the Office for Civil Rights finds that a recipient's system for distributing vocational education funds unlawfully discriminates on the basis of race, color, national origin, sex, or handicap, it will require the recipient to adopt an alternative nondiscriminatory method of distribution. The Office for Civil Rights may also require the recipient to compensate for the effects of its past unlawful discrimination in the distribution of funds.

IV. Access and Admission of Students To Vocational Education Programs

A. Recipient Responsibilities

Criteria controlling student eligibility for admission to vocational education schools, facilities and programs may not unlawfully discriminate on the basis of race, color, national origin, sex, or handicap. A recipient may not develop, impose, maintain, approve, or implement such discriminatory admissions criteria.

B. SITE SELECTION FOR VOCATIONAL SCHOOLS

State and local recipients may not select or approve a site for a vocational education facility for the purpose or with the effect of excluding, segregating, or otherwise discriminating against students on the basis of race, color, or national origin. Recipients must locate vocational education facilities at sites that are readily accessible to both nonminority and minority communities, and that do not tend to identify the facility or program as intended for nonminority or minority students.

C. ELIGIBILITY FOR ADMISSION TO VOCATIONAL EDUCATION CENTERS BASED ON RESIDENCE

Recipients may not establish, approve or maintain geographic boundaries for a vocational education center service area or attendance zone, (hereinafter "service area"), that unlawfully exclude students on the basis of race, color, or national origin. The Office for Civil Rights will presume, subject to rebuttal, that any one or combination of the following circumstances indicates that the boundaries of a given service area are unlawfully constituted:

1. A school system or service area contiguous to the given service area, contains minority or nonminority students in substantially greater proportion than the given service area;
2. A substantial number of minority students who reside outside the given vocational education center service area, and who are not eligible for the center reside, nonetheless, as close to the center as a substantial number of non-minority students who are eligible for the center;
3. The over-all vocational education program of the given service area in comparison to the over-all vocational education program of a contiguous school system or service area enrolling a substantially greater proportion of minority students:

(a) Provides its students with a broader range of curricular offerings, facilities and equipment; or (b) provides its graduates greater opportunity for employment in jobs:

(i) For which there is a demonstrated need in the community or region; (ii) that pay higher entry level salaries or wages; or (iii) that are generally acknowledged to offer greater prestige or status.

D. ADDITIONS AND RENOVATIONS TO EXISTING VOCATIONAL EDUCATION FACILITIES

A recipient may not add to, modify, or renovate the physical plant of a vocational education facility in a manner that creates, maintains, or increases student segregation on the basis of race, color, national origin, sex, or handicap.

E. REMEDIES FOR VIOLATIONS OF SITE SELECTION AND GEOGRAPHIC SERVICE AREA REQUIREMENTS

If the conditions specified in paragraphs IV, A, B, C, or D, immediately above, are found and not rebutted by proof of nondiscrimination, the Office for Civil Rights will require the recipient(s) to submit a plan to remedy the discrimination. The following are examples of steps that may be included in the plan, where necessary to overcome the discrimination:

(1) Redrawing of the boundaries of the vocational education center's service area to include areas unlawfully excluded and/or to exclude areas unlawfully included; (2) provision of transportation to students residing in areas unlawfully excluded; (3) provision of additional programs and services to students who would have been eligible for attendance at the vocational education center but for the discriminatory service area or site selection; (4) reassignment of students; and (5) construction of new facilities or expansion of existing facilities.

F. ELIGIBILITY FOR ADMISSION TO SECONDARY VOCATIONAL EDUCATION CENTERS BASED ON NUMERICAL LIMITS IMPOSED ON SENDING SCHOOLS

A recipient may not adopt or maintain a system for admission to a secondary vocational education center or program that limits admission to a fixed number of students from each sending school included in the center's service area if such a system disproportionately excludes students from the center on the basis of race, sex, national origin or handicap. (Example: Assume 25 percent of a school district's high school students are black and that most of those black students are enrolled in one high school; the white students, 75 percent of the district's total enrollment, are generally enrolled in the five remaining high schools. This paragraph prohibits a system of admission to the secondary vocational education center that limits eligibility to a fixed and equal number of students from each of the district's six high schools.)

G. REMEDIES FOR VIOLATION OF ELIGIBILITY BASED ON NUMERICAL LIMITS REQUIREMENTS

If the Office for Civil Rights finds a violation of paragraph F, above, the recipient must implement an alternative system of admissions that does not disproportionately exclude students on the basis of race, color, national origin, sex, or handicap.

H. Eligibility for Admission to Vocational Education Centers, Branches or Annexes Based Upon Student Option

A vocational education center, branch or annex, open to all students in a service area and predominantly enrolling minority students or students of one race, national origin or sex, will be presumed unlawfully segregated if:

(1) It was established by a recipient for members of one race, national origin or sex; or (2) it has since its construction been attended primarily by members of one race, national origin or sex; or (3) most of its program offerings have traditionally been selected predominantly by members of one race, national origin or sex.

I. Remedies for Facility Segregation Under Student Option Plans

If the conditions specified in paragraph IV-H are found and not rebutted by proof of nondiscrimination, the Office for Civil Rights will require the recipient(s) to submit a plan to remedy the segregation. The following are examples of steps that may be included in the plan, where necessary to overcome the discrimination:

(1) Elimination of program duplication in the segregated facility and other proximate vocational facilities; (2) relocation or "clustering" of programs or courses; (3) adding programs and courses that traditionally have been identified as intended for members of a particular race, national origin or sex to schools that have traditionally served members of the other sex or traditionally served persons of a different race or national origin; (4) merger of programs into one facility through school closings or new construction; (5) intensive outreach recruitment and counseling; (6) providing free transportation to students whose enrollment would promote desegregation.

J. [Reserved]

K. Eligibility Based on Evaluation of Each Applicant Under Admissions Criteria

Recipients may not judge candidates for admission to vocational education programs on the basis of criteria that have the effect of disproportionately excluding persons of a particular race, color, national origin, sex, or handicap. However, if a recipient can demonstrate that such criteria have been validated as essential to participation in a given program and that alternative equally valid criteria that do not have such a disproportionate adverse effect are unavailable, the criteria will be judged nondiscriminatory. Examples of admissions criteria that must meet this test are past academic performance, record of disciplinary infractions, counselors' approval, teachers' recommendations, interest inventories, high school diplomas and standardized tests, such as the Test of Adult Basic Education (TABE).

An introductory, preliminary, or exploratory course may not be established as a prerequisite for admission to a program unless the course has been and is available without regard to race, color, national origin, sex, and handicap. However, a course that was formerly only available on a discriminatory basis may be made a prerequisite for admission to a program if the recipient can demonstrate that:

(a) The course is essential to participation in the program; *and* (b) the course is presently available to those seeking enrollment for the first time and to those formerly excluded.

L. Eligibility of National Origin Minority Persons With Limited English Language Skills

Recipients may not restrict an applicant's admission to vocational education programs because the applicant, as a member of a national origin minority with limited English language skills, cannot participate in and benefit from vocational instruction to the same extent as a student whose primary language is English. It is the responsibility of the recipient to identify such applicants and assess their ability to participate in vocational instruction.

Acceptable methods of identification include: (1) Identification by administrative staff, teachers, or parents of secondary level students; (2) identification by the student in postsecondary or adult programs; and (3) appropriate diagnostic procedures, if necessary.

Recipients must take steps to open all vocational programs to these national origin minority students. A recipient must demonstrate that a concentration of students with limited English language skills in one or a few programs is not the result of discriminatory limitations upon the opportunities available to such students.

M. Remedial Action in Behalf of Persons With Limited English Language Skills

If the Office for Civil Rights finds that a recipient has denied national origin minority persons admission to a vocational school or program because of their limited English language skills or has assigned students to vocational programs solely on the basis of their limited English language skills, the recipient will be required to submit a remedial plan that insures national origin minority students equal access to vocational education programs.

N. EQUAL ACCESS FOR HANDICAPPED STUDENTS

Recipients may not deny handicapped students access to vocational education programs or courses because of architectural or equipment barriers, or because of the need for related aids and services or auxiliary aids. If necessary, recipients must:

(1) Modify instructional equipment; (2) modify or adapt the manner in which the courses are offered; (3) house the program in facilities that are readily accessible to mobility impaired students or alter facilities to make them readily accessible to mobility impaired students; and (4) provide auxiliary aids that effectively make lectures and necessary materials available to postsecondary handicapped students; (5) provide related aids or services that assure secondary students an appropriate education.

Academic requirements that the recipient can demonstrate are essential to a program of instruction or to any directly related licensing requirement will not be regarded as discriminatory. However, where possible, a recipient must adjust those requirements to the needs of individual handicapped students.

Access to vocational programs or courses may not be denied handicapped students on the ground that employment opportunities in any occupation or profession may be more limited for handicapped persons than for non-handicapped persons.

O. PUBLIC NOTIFICATION

Prior to the beginning of each school year, recipients must advise students, parents, employees and the general public that all vocational opportunities will be offered without regard to race, color, national origin, sex, or handicap. Announcement of this policy of non-discrimination may be made, for example, in local newspapers, recipient publications and/or other media that reach the general public, program beneficiaries, minorities (including national origin minorities with limited English language skills), women, and handicapped persons. A brief summary of program offerings and admission criteria should be included in the announcement; also the name, address and telephone number of the person designated to coordinate Title IX and Section 504 compliance activity.

If a recipient's service area contains a community of national origin minority persons with limited English language skills, public notification materials must be disseminated to that community in its language and must state that recipients will take steps to assure that the lack of English language skills will not be a barrier to admission and participation in vocational education programs.

V. COUNSELING AND PREVOCATIONAL PROGRAMS

A. RECIPIENT RESPONSIBILITIES

Recipients must insure that their counseling materials and activities (including student program selection and career/employment selection), promotional, and recruitment efforts do not discriminate on the basis of race, color, national origin, sex, or handicap.

B. COUNSELING AND PROSPECTS FOR SUCCESS

Recipients that operate vocational education programs must insure that counselors do not direct or urge any student to enroll in a particular career or program, or measure or predict a student's prospects for success in any career or program based upon the student's race, color, national origin, sex, or handicap. Recipients may not counsel handicapped students toward more restrictive career objectives than nonhandicapped students with similar abilities and interests. If a vocational program disproportionately enrolls male or female students, minority or nonminority students, or handicapped students, recipients must take steps to insure that the disproportion does not result from unlawful discrimination in counseling activities.

C. STUDENT RECRUITMENT ACTIVITIES

Recipients must conduct their student recruitment activities so as not to exclude or limit opportunities on the basis of race, color, national origin, sex, or handicap. Where recruitment activities involve the presentation or portrayal of vocational and career opportunities, the curricula and programs described should cover a broad range of occupational opportunities and not be limited on the basis of the race, color, national origin, sex, or handicap of the students or potential students to whom the presentation is made. Also, to the extent possible, recruiting teams should include persons of different races, national origins, sexes, and handicaps.

D. COUNSELING OF STUDENTS WITH LIMITED ENGLISH-SPEAKING ABILITY OR HEARING IMPAIRMENTS

Recipients must insure that counselors can effectively communicate with national origin minority students with limited English language skills and with students who have hearing impairments. This requirement may be satisfied by having interpreters available.

E. PROMOTIONAL ACTIVITIES

Recipients may not undertake promotional efforts (including activities of school officials, counselors, and vocational staff) in a manner that creates or perpetuates stereotypes or limitations based on race, color, national origin, sex or handicap. Examples of promotional efforts are career days, parents' night, shop demonstrations, visitations by groups of prospective students and by representatives from business and industry. Materials that are part of promotional efforts may not create or perpetuate stereotypes through text or illustration. To the extent possible they should portray males or females, minorities or handicapped persons in programs and occupations in which these groups traditionally have not been represented. If a recipient's service area contains a community of national origin minority persons with limited English language skills, promotional literature must be distributed to that community in its language.

VI. EQUAL OPPORTUNITY IN THE VOCATIONAL EDUCATION INSTRUCTIONAL SETTING

A. ACCOMMODATIONS FOR HANDICAPPED STUDENTS

Recipients must place secondary level handicapped students in the regular educational environment of any vocational education program to the maximum extent appropriate to the needs of the student unless it can be demonstrated that the education of the handicapped person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Handicapped students may be placed in a program only after the recipient satisfies the provisions of the Department's Regulation, 34 CFR, Part 104, relating to evaluation, placement, and procedural safeguards. If a separate class or facility is identifiable as being for handicapped persons, the facility, the programs, and the services must be comparable to the facilities, programs, and services offered to nonhandicapped students.

B. STUDENT FINANCIAL ASSISTANCE

Recipients may not award financial assistance in the form of loans, grants, scholarships, special funds, subsidies, compensation for work, or prizes to vocational education students on the basis of race, color, national origin, sex, or handicap, except to overcome the effects of past discrimination. Recipients may administer sex restricted financial assistance where the assistance and restriction are established by will, trust, bequest, or any similar legal instrument, if the overall effect of all financial assistance awarded does not discriminate on the basis of sex. Materials and information used to notify students of opportunities for financial assistance may not contain language or examples that would lead applicants to believe the assistance is provided on a discriminatory basis. If a recipient's service area contains a community of national origin mino
ty persons with limited English langua
skills, such information must be dissemin
ed to that community in its language.

C. HOUSING IN RESIDENTIAL POSTSECONDA
VOCATIONAL EDUCATION CENTERS

Recipients must extend housing opport
nities without discrimination based on ra
color, national origin, sex, or handicap. Th
obligation extends to recipients that provi
on-campus housing and/or that have agre
ments with providers of off-campus housin
In particular, a recipient postsecondary v
cational education program that provid
on-campus or off-campus housing to its no
handicapped students must provide, at th
same cost and under the same condition
comparable convenient and accessible hou
ing to handicapped students.

D. COMPARABLE FACILITIES

Recipients must provide changing room
showers, and other facilities for students
one sex that are comparable to those pr
vided to students of the other sex. This ma
be accomplished by alternating use of th
same facilities or by providing separa
comparable facilities.

Such facilities must be adapted or mod
fied to the extent necessary to make the v
cational education program readily access
ble to handicapped persons.

VII. WORK STUDY, COOPERATIVE VOCATION
EDUCATION, JOB PLACEMENT, AND APPREN
TICE TRAINING

A. RESPONSIBILITIES IN COOPERATIVE VOCA
TIONAL EDUCATION PROGRAMS, WORK
STUDY PROGRAMS, AND JOB PLACEMEN
PROGRAMS

A recipient must insure that: (a) It doe
not discriminate against its students on th
basis of race, color, national origin, sex, o
handicap in making available opportunitie
in cooperative education, work study an
job placement programs; and (b) student
participating in cooperative education, wor
study and job placement programs are no
discriminated against by employers or pro
spective employers on the basis of rac
color, national origin, sex, or handicap in re
cruitment, hiring, placement, assignment to
work tasks, hours of employment, levels of
responsibility, and in pay.

If a recipient enters into a written agre
ment for the referral or assignment of stu
dents to an employer, the agreement mus
contain an assurance from the employer
that students will be accepted and assigned
to jobs and otherwise treated without
regard to race, color, national origin, sex, or
handicap.

Recipients may not honor any employer's request for students who are free of handicaps or for students of a particular race, color, national origin, or sex. In the event an employer or prospective employer is or has been subject to court action involving discrimination in employment, school officials should rely on the court's findings if the decision resolves the issue of whether the employer has engaged in unlawful discrimination.

B. Apprentice Training Programs

A recipient may not enter into any agreement for the provision or support of apprentice training for students or union members with any labor union or other sponsor that discriminates against its members or applicants for membership on the basis of race, color, national origin, sex, or handicap. If a recipient enters into a written agreement with a labor union or other sponsor providing for apprentice training, the agreement must contain an assurance from the union or other sponsor:

(1) That it does not engage in such discrimination against its membership or applicants for membership; and (2) that apprentice training will be offered and conducted for its membership free of such discrimination.

VIII. Employment of Faculty and Staff

A. Employment Generally

Recipients may not engage in any employment practice that discriminates against any employee or applicant for employment on the basis of sex or handicap. Recipients may not engage in any employment practice that discriminates on the basis of race, color, or national origin if such discrimination tends to result in segregation, exclusion or other discrimination against students.

B. Recruitment

Recipients may not limit their recruitment for employees to schools, communities, or companies disproportionately composed of persons of a particular race, color, national origin, sex, or handicap except for the purpose of overcoming the effects of past discrimination. Every source of faculty must be notified that the recipient does not discriminate in employment on the basis of race, color, national origin, sex, or handicap.

C. Patterns Of Discrimination

Whenever the Office for Civil Rights finds that in light of the representation of protected groups in the relevant labor market there is a significant underrepresentation or overrepresentation of protected group persons on the staff of a vocational education school or program, it will presume that the disproportion results from unlawful discrimination. This presumption can be overcome by proof that qualified persons of the particular race, color, national origin, or sex, or that qualified handicapped persons are not in fact available in the relevant labor market.

D. Salary Policies

Recipients must establish and maintain faculty salary scales and policy based upon the conditions and responsibilities of employment, without regard to race, color, national origin, sex or handicap.

E. Employment Opportunities For Handicapped Applicants

Recipients must provide equal employment opportunities for teaching and administrative positions to handicapped applicants who can perform the essential functions of the position in question. Recipients must make reasonable accommodation for the physical or mental limitations of handicapped applicants who are otherwise qualified unless recipients can demonstrate that the accommodation would impose an undue hardship.

F. The Effects Of Past Discrimination

Recipients must take steps to overcome the effects of past discrimination in the recruitment, hiring, and assignment of faculty. Such steps may include the recruitment or reassignment of qualified persons of a particular race, national origin, or sex, or who are handicapped.

G. Staff Of State Advisory Councils Of Vocational Education

State Advisory Councils of Vocational Education are recipients of Federal financial assistance and therefore must comply with Section VIII of the Guidelines.

H. Employment at State Operated Vocational Education Centers Through State Civil-Service Authorities

Where recruitment and hiring of staff for State operated vocational education centers is conducted by a State civil service employment authority, the State education agency operating the program must insure that recruitment and hiring of staff for the vocational education center is conducted in accordance with the requirements of these Guidelines.

IX. Proprietary Vocational Education Schools

A. Recipient Responsibilities

Proprietary vocational education schools that are recipients of Federal financial assistance through Federal student assistance programs or otherwise are subject to all of

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the requirements of the Department's regulations and these Guidelines.

B. ENFORCEMENT AUTHORITY

Enforcement of the provisions of Title IX of the Education Amendments of 1972 and Section 504 of the Rehabilitation Act of 1973 is the responsibility of the Department of Education. However, authority to enforce Title VI of the Civil rights Act of 1964 for proprietary vocational education schools has been delegated to the Veterans Administration.

When the Office for Civil Rights receives a Title VI complaint alleging discrimination by a proprietary vocational education school it will forward the complaint to the Veterans Administration and cite the applicable requirements of the Department's regulations and these Guidelines. The complainant will be notified of such action.

[45 FR 30918, May 9, 1980; 45 FR 37426, June 3, 1980]

PART 101—PRACTICE AND PROCEDURE FOR HEARINGS UNDER PART 100 OF THIS TITLE

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Authority: 5 U.S.C. 301.

Source: 45 FR 30931, May 9, 1980, unless otherwise noted.

Subpart A—General Information

§ 101.1 Scope of rules.

The rules of procedure in this part supplement §§ 100.9 and 100.10 of this subtitle and govern the practice for hearings, decisions, and administrative review conducted by the Department of Education, pursuant to Title VI of the Civil Rights Act of 1964 (section 602, 78 Stat. 252) and Part 100 of this subtitle.

§ 101.2 Records to be public.

All pleadings, correspondence, exhibits, transcripts, of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the Civil Rights hearing clerk. Inquiries may be made at the Department of Education, 400 Maryland Avenue SW., Washington, D.C. 20202.

§ 101.3 Use of gender and number.

As used in this part, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing the masculine gender may be applied to females or organizations.

§ 101.4 Suspension of rules.

Upon notice to all parties, the reviewing authority or the presiding officer, with respect to matters pending before them, may modify or waive any rule in this part upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

Subpart B—Appearance and Practice

§ 101.11 Appearance.

A party may appear in person or by counsel and participate fully in any proceeding. A State agency or a corporation may appear by any of its officers or by any employee it authorizes to appear on its behalf. Counsel must be members in good standing of the bar of a State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

§ 101.12 Authority for representation.

Any individual acting in a representative capacity in any proceeding may be required to show his authority to act in such capacity.

§ 101.13 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at any hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

Subpart C—Parties

§ 101.21 Parties.

(a) The term party shall include an applicant or recipient or other person to whom a notice of hearing or opportunity for hearing has been mailed naming him a respondent.

(b) The Assistant Secretary for Civil Rights of the Department of Education, shall be deemed a party to all proceedings.

§ 101.22 Amici curiae.

(a) Any interested person or organization may file a petition to participate in a proceeding as an amicus curiae. Such petition shall be filed prior to the prehearing conference, or if none is held, before the commencement of the hearing, unless the petitioner shows good cause for filing the petition later. The presiding officer may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof. An amicus curiae is not a party and may not introduce evidence at a hearing.

(b) An amicus curiae may submit a statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. The amicus curiae may submit a brief on each occasion a decision is to be made or a prior decision is subject to review. His brief shall be filed and served on each party within the time limits applicable to the party whose position he deems himself to support; or if he does not deem himself to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(c) When all parties have completed their initial examination of a witness, any amicus curiae may request the presiding officer to propound specific questions to the witness. The presiding officer, in his discretion, may grant any such request if he believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

§ 101.23 Complainants not parties.

A person submitting a complaint pursuant to § 100.7(b) of this title is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae.

Subpart D—Form, Execution, Service and Filing of Documents

§ 101.31 Form of documents to be filed.

Documents to be filed under the rules in this part shall be dated, the original signed in ink, shall show the docket description and title of the proceeding, and shall show the title, if any, and address of the signatory. Copies need not be signed but the name of the person signing the original shall be reproduced. Documents shall be legible and shall not be more than 8½ inches wide and 12 inches long.

§ 101.32 Signature of documents.

The signature of a party, authorized officer, employee or attorney constitutes a certificate that he has read the document, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may proceed as though the document had not been filed. Similar action may be taken if scandalous or indecent matter is inserted

§ 101.33 Filing and service.

All notices by a Department official and all written motions, requests, petitions, memoranda, pleadings, exceptions, briefs, decisions, and correspondence to a Department official from a party, or vice versa, relating to a proceeding after its commencement shall be filed and served on all parties. Parties shall supply the original and two copies of documents submitted for filing. Filings shall be made with the Civil Rights hearing clerk at the address stated in the notice of hearing or notice of opportunity for hearing during regular business hours. Regular business hours are every Monday through Friday (legal holidays in the District of Columbia excepted) from 9 a.m. to 5:30 p.m., eastern standard or daylight saving time, whichever is effective in the District of Columbia at the time. Originals only on exhibits and transcripts of testimony need be filed. For requirements of service on amici curiae, see § 101.107.

§ 101.34 Service—how made.

Service shall be made by personal delivery of one copy to each person to be served or by mailing by first-class mail, properly addressed with postage prepaid. When a party or amicus has appeared by attorney or other representative, service upon such attorney or representative will be deemed service upon the party or amicus. Documents served by mail preferably should be mailed in sufficient time to reach the addressee by the date on which the original is due to be filed, and should be air mailed if the addressee is more than 300 miles distant.

§ 101.35 Date of service.

The date of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person, except that the date of service of the initial notice of hearing or opportunity for hearing shall be the date of its delivery, or of its attempted delivery if refused.

§ 101.36 Certificate of service.

The original of every document filed and required to be served upon parties to a proceeding shall be endorsed with a certificate of service signed by the party making service or by his attorney or representative, stating that such service has been made, the date of service, and the manner of service, whether by mail or personal delivery.

Subpart E—Time

§ 101.41 Computation.

In computing any period of time under the rules in this part or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed in the District of Columbia, in which event it includes the next following business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

§ 101.42 Extension of time or postponement.

Requests for extension of time should be served on all parties and should set forth the reasons for the application. Applications may be granted upon a showing of good cause by the applicant. From the designation of a presiding officer until the issuance of his decision such requests should be addressed to him. Answers to such requests are permitted, if made promptly.

§ 101.43 Reduction of time to file documents.

For good cause, the reviewing authority or the presiding officer, with respect to matters pending before them, may reduce any time limit prescribed by the rules in this part, except as provided by law or in Part 80 of this title.

Subpart F—Proceedings Prior to Hearing

§ 101.51 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing to an affected applicant or recipient, pursuant to § 100.9 of this title.

§ 101.52 Answer to notice.

The respondent, applicant or recipient may file an answer to the notice within 20 days after service thereof. Answers shall admit or deny specifically and in detail each allegation of the notice, unless the respondent party is without knowledge, in which case his answer should so state, and the statement will be deemed a denial. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered. Failure of the respondent to file an answer within the 20-day period following service of the notice may be deemed an admission of all matters of fact recited in the notice.

§ 101.53 Amendment of notice or answer.

The Assistant Secretary for Civil Rights may amend the notice of hearing or opportunity for hearing once as a matter of course before an answer thereto is served, and each respondent may amend his answer once as a matter of course not later than 10 days before the date fixed for hearing but in no event later than 20 days from the date of service of his original answer. Otherwise a notice or answer may be amended only by leave of the presiding officer. A respondent shall file his answer to an amended notice within the time remaining for filing the answer to the original notice or within 10 days after service of the amended notice, whichever period may be the longer, unless the presiding officer otherwise orders.

§ 101.54 Request for hearing.

Within 20 days after service of a notice of opportunity for hearing which does not fix a date for hearing the respondent, either in his answer or in a separate document, may request a hearing. Failure of the respondent to request a hearing shall be deemed a waiver of the right to a hearing and to constitute his consent to the making of a decision on the basis of such information as is available.

§ 101.55 Consolidation.

The responsible Department official may provide for proceedings in the Department to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies. All parties to any proceeding consolidated subsequently to service of the notice of hearing or opportunity for hearing shall be promptly served with notice of such consolidation.

§ 101.56 Motions.

Motions and petitions shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing, these matters shall be in writing. If made at the hearing, they may be stated orally; but the presiding officer may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Motions, answers, and replies shall be addressed to the presiding officer, if the case is pending before him. A repetitious motion will not be entertained.

§ 101.57 Responses to motions and petitions.

Within 8 days after a written motion or petition is served, or such other period as the reviewing authority or the presiding officer may fix, any party may file a response thereto. An immediate oral response may be made to an oral motion.

§ 101.58 Disposition of motions and petitions.

The reviewing authority or the presiding officer may not sustain or grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however,* That prehearing conferences, hearings and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately. Motions and petitions submitted to the reviewing authority or the presiding officer, respectively, and not disposed of in separate rulings or in their respective decisions will be deemed denied. Oral arguments shall not be held or written motions or petitions unless the presiding officer in his discretion expressly so orders.

Subpart G—Responsibilities and Duties of Presiding Officer

§ 101.61 Who presides.

A hearing examiner assigned under 5 U.S.C. 3105 or 3344 (formerly section 11 of the Administrative Procedure Act) shall preside over the taking of evidence in any hearing to which these rules of procedure apply.

§ 101.62 Designation of hearing examiner.

The designation of the hearing examiner as presiding officer shall be in writing, and shall specify whether the examiner is to make an initial decision or to certify the entire record including his recommended findings and proposed decision to the reviewing authority, and may also fix the time and place of hearing. A copy of such order shall be served on all parties. After service of an order designating a hearing examiner to preside, and until such examiner makes his decision, motions and petitions shall be submitted to him. In the case of the death, illness, disqualification or unavailability of the designated hearing examiner, another hearing examiner may be designated to take his place.

§ 101.63 Authority of presiding officer.

The presiding officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He shall have all powers necessary to these ends, including (but not limited to) the power to:

(a) Arrange and issue notice of the date, time, and place of hearings, or, upon due notice to the parties, to change the date, time, and place of hearings previously set.

(b) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(c) Require parties and amici curiae to state their position with respect to the various issues in the proceeding.

(d) Administer oaths and affirmations.

(e) Rule on motions, and other procedural items on matters pending before him.

(f) Regulate the course of the hearing and conduct of counsel therein.

(g) Examine witnesses and direct witnesses to testify.

(h) Receive, rule on, exclude or limit evidence.

(i) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him.

(j) Issue initial or recommended decisions.

(k) Take any action authorized by the rules in this part or in conformance with the provisions of 5 U.S.C. 551-559 (the Administrative Procedure Act).

Subpart H—Hearing Procedures

§ 101.71 Statement of position and trial briefs.

The presiding officer may require parties and amici curiae to file written statements of position prior to the beginning of a hearing. The presiding officer may also require the parties to submit trial briefs.

§ 101.72 Evidentiary purpose.

(a) The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather it should be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, which shall be limited to statement of the party's position and what he intends to prove, may be made at hearings.

(b) Hearings for the reception of evidence will be held only in cases where issues of fact must be resolved in order to determine whether the respondent has failed to comply with one or more applicable requirements of Part 100 of this title. In any case where it appears from the respondent's answer to the notice of hearing or opportunity for hearing, from his failure timely to answer, or from his admissions or stipulations in the record, that there are no matters of material fact in dispute, the reviewing authority or presiding officer may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for filing briefs under § 101.101. Thereafter the proceedings shall go to conclusion in accordance with Subpart J of this part. The presiding officer may allow an appeal from such order in accordance with § 101.86.

§ 101.73 Testimony.

Testimony shall be given orally under oath or affirmation by witnesses at the hearing; but the presiding officer, in his discretion, may require or permit that the direct testimony of any witness be prepared in writing and served on all parties in advance of the hearing. Such testimony may be adopted by the witness at the hearing, and filed as part of the record thereof. Unless authorized by the presiding officer, witnesses will not be permitted to read prepared testimony into the record. Except as provided in §§ 101.75 and 101.76, witnesses shall be available at the hearing for cross-examination.

§ 101.74 Exhibits.

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing if the presiding officer so requires. Proposed exhibits not so exchanged may be denied admission as evidence. The authenticity of all proposed exhibits exchanged prior to hearing will be deemed admitted unless written objection thereto is filed prior to the hearing or unless good cause is shown at the hearing for failure to file such written objection.

§ 101.75 Affidavits.

An affidavit is; not inadmissible as such. Unless the presiding officer fixes other time periods affidavits shall be filed and served on the parties not later than 15 days prior to the hearing; and not less than 7 days prior to hearing a party may file and serve written objection to any affidavit on the ground that he believes it necessary to test the truth of assertions therein at hearing. In such event the assertions objected to will not be received in evidence unless the affiant is made available for cross-examination, or the presiding officer determines that cross-examination is not necessary for the full and true disclosure of facts referred to in such assertions. Notwithstanding any objection, however, affidavits may be considered in the case of any respondent who waives a hearing.

§ 101.76 Depositions.

Upon such terms as may be just, for the convenience of the parties or of the Department, the presiding officer may authorize or direct the testimony of any witness to be taken by deposition.

§ 101.77 Admissions as to facts and documents.

Not later than 15 days prior to the scheduled date of the hearing except for good cause shown, or prior to such earlier date as the presiding officer may order, any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters of which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 10 days after service thereof, or within such further time as the presiding officer or the reviewing authority if no presiding officer has yet been designated may allow upon motion and notice) the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny such matters. Copies of requests for admission and answers thereto shall be served on all parties. Any admission made by a party to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement of any order entered therein, and shall not constitute and admission by him for any other purpose or be used against him in any other proceeding or action.

§ 101.78 Evidence.

Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded.

§ 101.79 Cross-examination.

A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination.

§ 101.80 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not deemed part of the evidence or record in the hearing.

§ 101.81 Objections.

Objections to evidence shall be timely and briefly state the ground relied upon.

§ 101.82 Exceptions to rulings of presiding officer unnecessary.

Exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of the presiding officer is sought, makes known the action which he desires the presiding officer to take, or his objection to an action taken, and his grounds therefor.

§ 101.83 Official notice.

Where official notice is taken or is to be taken of a material fact not appearing in the evidence of record, any party, on timely request, shall be afforded an opportunity to show the contrary.

§ 101.84 Public document items.

Whenever there is offered (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a State or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice, as a public document item by specifying the document or relevant part thereof.

§ 101.85 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

§ 101.86 Appeals from ruling of presiding officer.

Rulings of the presiding officer may not be appealed to the reviewing authority prior to his consideration of the entire proceeding except with the consent of the presiding officer and where he certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense, or prejudice to any party, or substantial detriment to the public interest. If an appeal is allowed, any party may file a brief with the reviewing authority within such period as the presiding officer directs. No oral argument will be heard unless the reviewing authority directs otherwise. At any time prior to submission of the proceeding to it for decisions, the reviewing authority may direct the presiding officer to certify any question or the entire record to it for decision. Where the entire record is so certified, the presiding officer shall recommend a decision.

Subpart I—The Record

§ 101.91 Official transcript.

The Department will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance.

§ 101.92 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision shall constitute the exclusive record for decision.

Subpart J—Posthearing Procedures, Decisions

§ 101.101 Posthearing briefs: proposed findings and conclusions.

(a) The presiding officer shall fix the time for filing posthearing briefs, which may contain proposed findings of fact and conclusions of law, and, if permitted, reply briefs.

(b) Briefs should include a summary of the evidence relied upon together with references to exhibit numbers and pages of the transcript, with citations of the authorities relied upon.

§ 101.102 Decisions following hearing.

When the time for submission of posthearing briefs has expired, the presiding officer shall certify the entire record, including his recommended findings and proposed decision, to the responsible Department official; or if so authorized he shall make an initial decision. A copy of the recommended findings and proposed decision, or of the initial decision, shall be served upon all parties, and amici, if any.

§ 101.103 Exceptions to initial or recommended decisions.

Within 20 days after the mailing of an initial or recommended decision, any party may file exceptions to the decision, stating reasons therefor, with the reviewing authority. Any other party may file a response thereto within 30 days after the mailing of the decision. Upon the filing of such exceptions, the reviewing authority shall review the decision and issue its own decision thereon.

§ 101.104 Final decisions.

(a) Where the hearing is conducted by a hearing examiner who makes an initial decision, if no exceptions thereto are filed within the 20-day period specified in § 101.103, such decision shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 101.106.

(b) Where the hearing is conducted by a hearing examiner who makes a recommended decision, or upon the filing of exceptions to a hearing examiner's initial decision, the reviewing authority shall review the recommended or initial decision and shall issue its own decision thereon, which shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 101.106.

(c) All final decisions shall be promptly served on all parties, and amici, if any.

§ 101.105 Oral argument to the reviewing authority.

(a) If any party desires to argue a case orally on exceptions or replies to exceptions to an initial or recommended decision, he shall make such request in writing. The reviewing authority may grant or deny such requests in its discretion. If granted, it will serve notice of oral argument on all parties. The notice will set forth the order of presentation, the amount of time allotted, and the time and place for argument. The names of persons who will argue should be filed with the Department hearing clerk not later than 7 days before the date set for oral argument.

(b) The purpose of oral argument is to emphasize and clarify the written argument in the briefs. Reading at length from the brief or other texts is not favored. Participants should confine their arguments to points of controlling importance and to points upon which exceptions have been filed. Consolidations of appearances at oral argument by parties taking the same side will permit the parties' interests to be presented more effectively in the time allotted.

(c) Pamphlets, charts, and other written material may be presented at oral argument only if such material is limited to facts already in the record and is served on all parties and filed with the Department hearing clerk at least 7 days before the argument.

§ 101.106 Review by the Secretary.

Within 20 days after an initial decision becomes a final decision pursuant to § 101.104(a) or within 20 days of the mailing of a final decision referred to in § 101.104(b), as the case may be, a party may request the Secretary to review the final decision. The Secretary may grant or deny such request, in whole or in part, or serve notice of his intent to review the decision in whole or in part upon his own motion. If the Secretary grants the requested review, or if he serves notice of intent to review upon his own motion, each party to the decision shall have 20 days following notice of the Secretary's proposed action within which to file exceptions to the decision and supporting briefs and memoranda, or briefs and memoranda in support of the decision. Failure of a party to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

§ 101.107 Service on amici curiae.

All briefs, exceptions, memoranda, requests, and decisions referred to in this Subpart J shall be served upon amici curiae at the same times and in the same manner required for service on parties. Any written statements of position and trial briefs required of parties under § 101.71 shall be served on amici.

Subpart K—Judicial Standards of Practice

§ 101.111 Conduct.

Parties and their representatives are expected to conduct themselves with honor and dignity and observe judicial standards of practice and ethics in all proceedings. They should not indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations. A representative of any party whether or not a lawyer shall observe the traditional responsibilities of lawyers as officers of the court and use his best efforts to restrain his client from improprieties in connection with a proceeding.

§ 101.112 Improper conduct.

With respect to any proceeding it is improper for any interested person to attempt to sway the judgement of the reviewing authority by undertaking to bring pressure or influence to bear upon any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper that such interested persons or any members of the Department's staff or the presiding officer give statements to communications media, by paid advertisement or otherwise, designed to influence the judgement of any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper for any person to solicit communications to any such officer, or his decisional staff, other than proper communications by parties or amici curiae.

§ 101.113 Ex parte communications.

Only persons employed by or assigned to work with the reviewing authority who perform no investigative or prosecuting function in connection with a proceeding shall communicate ex parte with the reviewing authority, or the presiding officer, or any employee or person involved in the decisional process in such proceedings with respect to the merits of that or a factually related proceeding. The reviewing authority, the presiding officer, or any employee or person involved in the decisional process of a proceeding shall communicate ex parte with respect to the merits of that or a factually related proceeding only with persons employed by or assigned to work with them and who perform no investigative or prosecuting function in connection with the proceeding.

§ 101.114 Expeditious treatment.

Requests for expeditious treatment of matters pending before the responsible Department official or the presiding officer are deemed communications on the merits, and are improper except when forwarded from parties to a proceeding and served upon all other parties thereto. Such communications should be in the form of a motion.

§ 101.115 Matters not prohibited.

A request for information which merely inquires about the status of a proceeding without discussing issues or expressing points of view is not deemed an ex parte communication. Such requests should be directed to the Civil Rights hearing clerk. Communications with respect to minor procedural matters or inquiries or emergency requests for extensions of time are not deemed ex parte communications prohibited by § 101.113. Where feasible, however, such communications should be by letter with copies to all parties. Ex parte communications between a respondent and the responsible Department official or the Secretary with respect to securing such respondent's voluntary compliance with any requirement of Part 100 of this title are not prohibited.

§ 101.116 Filing of ex parte communications.

A prohibited communication in writing received by the Secretary, the reviewing authority, or by the presiding officer, shall be made public by placing it in the correspondence file of the docket in the case and will not be considered as part of the record for decision. If the prohibited communication is received orally a memorandum setting forth its substance shall be made and filed in the correspondence section of the docket in the case. A person referred to in such memorandum may file a comment for inclusion in the docket if he considers the memorandum to be incorrect.

Subpart L—Posttermination Proceedings

§ 101.121 Posttermination proceedings.

(a) An applicant or recipient adversely affected by the order terminating, discontinuing, or refusing Federal financial assistance in consequence of proceedings pursuant to this title may request the responsible Department official for an order authorizing payment, or permitting resumption, of Federal financial assistance. Such request shall be in writing and shall affirmatively show that since entry of the order, it has brought its program or activity into compliance with the requirements of the Act, and with the Regulation thereunder, and shall set forth specifically, and in detail, the steps which it has taken to achieve such compliance. If the responsible Department official denies such request the applicant or recipient shall be given an expeditious hearing if it so requests in writing and specifies why it believes the responsible Department official to have been in error. The request for such a hearing shall be addressed to the responsible Department official and shall be made within 30 days after the applicant or recipient is informed that the responsible Department official has refused to authorize payment or permit resumption of Federal financial assistance.

(b) In the event that a hearing shall be requested pursuant to paragraph (a) of this section, the hearing procedures established by this part shall be applicable to the proceedings, except as otherwise provided in this section.

Subpart M—Definitions

§ 101.131 Definitions.

The definitions contained in § 100.1 of this subtitle apply to this part unless the context otherwise requires and the term "reviewing authority" as used herein includes the Secretary of Education, with respect to action by that official under § 101.106.

Transition provisions: (a) The amendments herein shall become effective upon publication in the FEDERAL REGISTER.

(b) These rules shall apply to any proceeding or part thereof to which Part 100 of this title applies. In the case of any proceeding or part thereof governed by the provisions of 34 CFR Part 100 (Title VI regulations of the Department of Education) as that part existed prior to the amendments published in the FEDERAL REGISTER on Oct. 19, 1967 (effective on that date), the rules in this Part 101 shall apply as if those amendments were not in effect.

PART 104—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

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APPENDIX A TO PART 104—ANALYSIS OF FINAL REGULATION

APPENDIX B TO PART 104—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS [NOTE]

AUTHORITY: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub. L. 94-142, 89 Stat. 795.

SOURCE: 45 FR 30936, May 9, 1980, unless otherwise noted.

EFFECTIVE DATE NOTE: For an interpretation document affecting Part 104, see 46 FR 4912, Jan. 19, 1981. The effective date of the interpretation was deferred to March 30, 1981, at 46 FR 12495, Feb. 17, 1981. The effective date was again deferred to May 10, 1981, at 46 FR 18975, Mar. 27, 1981, and deferred until further notice at 46 FR 25614, May 8, 1981.

Subpart A—General Provisions

§ 104.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 104.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Education and to each program or activity that receives or benefits from such assistance.

§ 104.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.

(d) "Department" means the Department of Education.

(e) "Assistant Secretary" means the Assistant Secretary for Civil Rights of the Department of Education.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool elementary, secondary, or adult educational services, a handicappped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§ 104.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activitiy which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§ 104.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Assistant Secretary, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Assistant Secretary may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 104.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Assistant Secretary, where appropriate, may require either or both recipients to take remedial action.

(3) The Assistant Secretary may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such

discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Assistant Secretary upon request: (i) A list of the interested persons consulted (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

§ 104.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§ 104.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 104.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 104.9 Administrative requirements for small recipients.

The Assistant Secretary may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 104.7 and 104.8, in whole or in part, when the Assistant Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 104.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 104.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absense, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 104.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 104.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 104.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 104.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 104.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided,* That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

Subpart C—Program Accessibility

§ 104.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 104.22 Existing facilities.

(a) *Program accessibility.* A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 104.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicappped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify the steps of that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usuable by handicapped persons.

§ 104.23 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) ***American National Standards Institute accessibility standards.*** Design, construction, or alteration of facilities in conformance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc. (ANSI A117.1-1961 (R1971)), which is incorporated by reference in this part, shall constitute compliance with paragraphs (a) and (b) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided. Incorporation by reference provisions approved by the Director of the Federal Register, May 27, 1975. Incorporated documents are on file at the Office of the Federal Register. Copies of the standards are obtainable from American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.

[45 FR 30936, May 9, 1980; 45 FR 37426, June 3, 1980]

Subpart D—Preschool, Elementary, and Secondary Education

§ 104.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 104.32 Location and notification.

A recipient that operates a public elementary or secondary education program shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§ 104.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) ***Appropriate education.*** (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person in or refer such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education*—(1) *General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

(3) *Residential placement.* If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and § 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or otherwise regarding the question of financial responsibility are subject to the due process procedures of § 104.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§ 104.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§ 104.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is belived to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 104.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

§ 104.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§ 104.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 104.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§ 104.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in § 104.33(b)(1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§ 104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of §§ 104.34, 104.37, and 104.38.

Subpart E—Postsecondary Education

§ 104.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 104.42 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Assistant Secretary to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 104.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 104.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided,* That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 104.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§ 104.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 104.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 104.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate Subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates Subpart B.

§ 104.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not disacriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 104.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

Subpart F—Health, Welfare, and Social Services

§ 104.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 104.52 Health, welfare, and other social services.

(a) *General.* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 104.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Assistant Secretary may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids wou
not significantly impair the ability
the recipient to provide its benefits
services.

(3) For the purpose of this pa
graph, auxiliary aids may inclu
brailled and taped material, interpre
ers, and other aids for persons wi
impaired hearing or vision.

§ 104.53 Drug and alcohol addicts.

A recipient to which this subpart a
plies that operates a general hospit
or outpatient facility may not d
criminate in admission or treatme
against a drug or alcohol abuser or a
coholic who is suffering from a med
cal condition, because of the persor
drug or alcohol abuse or alcoholism.

§ 104.54 Education of institutionaliz persons.

A recipient to which this subpart a
plies and that operates or supervises
program or activity for persons wh
are institutionalized because of hand
cap shall ensure that each qualifie
handicapped person, as defined i
§ 104.3(k)(2), in its program or activit
is provided an appropriate educatio
as defined in § 104.33(b). Nothing i
this section shall be interpreted as a
tering in any way the obligations of re
cipients under Subpart D.

Subpart G—Procedures

§ 104.61 Procedures.

The procedural provisions applicabl
to title VI of the Civil Rights Act o
1964 apply to this part. These proce
dures are found in §§ 100.6-100.10 an
Part 101 of this title.

APPENDIX A TO PART 104—ANALYSIS OF FINAL REGULATION

SUBPART A—GENERAL PROVISIONS

Definitions—1. *"Recipient".* Section
104.23 contains definitions used throughout
the regulation.

One comment requested that the regulation specify that nonpublic elementary and
secondary schools that are not otherwise recipients do not become recipients by virtue
of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the

regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of § 104.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *"Federal financial assistance"*. In § 104.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended section 504 to apply to such contracts.

3. *"Handicapped person"*. Section 104.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phrase "substantially limits." The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of section 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j)(2)(i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of "record" in paragraph (j)(2)(iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. *Drug addicts and alcoholics.* As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the work-place, provided that such rules are enforced against all employees.

With respect to other services, the implications of coverage, of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. *"Qualified handicapped person."* Paragraph (k) of § 104.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Section 104.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of § 104.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 104.3(k)(2) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of § 104.6(a)(3), however, persons beyond the age limits prescribed in § 104.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 104.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which State law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act—generally, 3-18 as of September 1978, and 3-21 as of September 1980 are incorporated by reference in this paragraph.

Section 104.3(k)(3) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination.* Section 104.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1(i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective," defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau* v. *Nichols*, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriated to the person's needs" is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to § 104.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§ 104.38 and 104.47 in connection with physical education and athletics programs.

Section 104.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret § 104.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of § 104.23.

7. *Assurances of compliance.* Section 104.5(a) requires a recipient to submit to the Assistant Secretary an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. *Private rights of action.* Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of Government. There is, however, case law holding that such a right exists. *Lloyd* v. *Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977); *see Hairston* v. *Drosick*, Civil No. 75-0691 (S.D. W. Va., Jan. 14, 1976); *Gurmankin* v. *Castanzo*, 411 F. Supp. 982 (E.D. Pa. 1976); *cf. Lau* v. *Nichols*, *supra*.

9. *Remedial action.* Where there has been a finding of discrimination, § 104.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a) (1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. *Voluntary action.* In § 104.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11. *Self-evaluation.* Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c) (ii) and (iii).

Paragraph (c)(2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. *Grievance procedure.* Section 104.7 requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that grievance procedures are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of § 104.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 104.8 (formerly § 84.9) sets forth requirements for dissemination of statements of nondicrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In § 104.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paper work burdens on them and unduly stretch the enforcement resources of the Department.

Section 104.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of § 104.8(a) has been revised to list possible, rather than required, means of notification. Section 104.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, § 104.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Section 104 which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new § 104.9 the Assistant Secretary may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 104.10(a) states that compliance with the regulation is not excused by State or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession, does not excuse a recipient from complying with the regulation. Thus, a law school could not deny admission to a blind applicant because blind laywers may find it more difficult to find jobs than do nonhandicapped lawyers.

SUBPART B—EMPLOYMENT PRACTICES

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of Federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972 (34 CFR, Part 106) and the regulation of the Department of Labor under section 503 of the Rehabilitation Act, which requries certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to title IX are also subject to this regulation. In addition, many recipients subject to this regulation receive Federal procurement contracts in excess of $2,500 and are therefore also subject to section 503.

15. *Discriminatory practices.* Section 104.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a)(2) has been added to clarify the employment obligations of recipients that receive Federal funds under Part B of the Education of the Handicapped Act, as amended (EHA). Section 606 of the EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons. This obligation is similar to the nondiscrimination requirement of section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting section 606 Congress chose the words "positive steps" instead of "affirmative action" advisedly and did not intend section 606 to incorporate the types of activities required under Executive Order 11246 (affirmative action on the basis of race, color, sex, or national origin) or under sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of § 104.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16. *Reasonable accommodation.* The reasonable accommodation requirement of § 104.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirements of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 104.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job, where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

Section 104.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. The reasonable accommodation standard in § 104.12 is similar to the obligation imposed upon Federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the Federal Government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the "business necessity" standard of the Labor regulation because that term seemed inappropriate to the nature of the programs operated by the majority of institutions subject to this regulation, e.g., public school systems, colleges and universities. The factors listed in paragraph (c) are intended to make the rationale underlying the business necessity standard applicable to an understandable by recipients of ED funds.

17. *Tests and selection criteria.* Revised § 104.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Assistant Secretary to be available. This paragraph is an application of the principle established under title VII of the Civil Rights Act of 1964 in *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of "disproportionate, adverse effect" difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related. A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related. In addition, § 104.13(a) has been revised to place the burden on the Assistant Secretary, rather than the recipient, to identify alternate tests.

Section 104.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests so as best to ensure that the test will measure the handicapped person's ability to perform on the job rather than the person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly. Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but instead will reflect impaired speech.

18. *Preemployment inquiries.* Section 104.14, concerning preemployment inquiries, generated a large number of comments. Commenters representing handicapped persons strongly favored a ban on preemployment inquiries on the ground that such inquiries are often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests of employers. Some recipients, on the other hand, argued that preemployment inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping condition, and accommodations that might be required.

The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job-related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license (if that is a necessary qualification for the position in question). Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees.

Section 104.14(b) allows preemployment inquiries only if they are made in conjunction with required remedial action to correct past discrimination, with voluntary action to overcome past conditions that have limited the participation of handicapped persons, or with obligations under section 503 of the Rehabilitation Act of 1973. In these instances, paragraph (b) specifies certain safeguards that must be followed by the employer.

Finally, the revised provision allows an employer to condition offers of employment to handicapped persons on the results of medical examinations, so long as the examinations are administered to all employees in a nondiscriminatory manner and the results are treated on a confidential basis.

19. *Specific acts of Discrimination.* Sections 104.15 (recruitment), 104.16 (compensation), 104.17 (job classification and structure) and 104.18 (fringe benefits) have been deleted from the regulation as unnecessarily duplicative of § 104.11 (discrimination prohibited). The deletion of these sections in no way changes the substantive obligations of employers subject to this regulation from those set forth in the July 16 proposed regulation. These deletions bring the regulation closer in form to the Department of Labor's section 503 regulation.

A proposed section, concerning fringe benefits, had allowed for differences in benefits or contributions between handicapped and nonhandicapped persons in situations only where such differences could be justified on an actuarial basis. Section 104.11 simply bars discrimination in providing fringe benefits and does not address the issue of actuarial differences. The Department believes that currently available data and experience do not demonstrate a basis for promulgating a regulation specifically allowing for differences in benefits or contributions.

SUBPART C—PROGRAM ACCESSIBILITY

In general, Subpart C prohibits the exclusion of qualified handicapped persons from federally assisted programs or activities because a recipient's facilities are inaccessible or unusable.

20. *Existing facilities.* Section 104.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation. The section states that a recipients program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be achieved by a number of means, including redesign of equipment, reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under § 104.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically requested course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and for other colleges and universities in that area to participate in that school's program, thereby developing an educational consortium for the postsecondary education of handicapped students. The Department believes that such a consortium, when developed and applied only to handicapped persons, would not constitute compliance with § 104.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

Nothing in this regulation, however, should be read as prohibiting institutions from forming consortia for the benefit of all students. Thus, if three colleges decide that it would be cost-efficient for one college to offer biology, the second physics, and the third chemistry to all students at the three colleges, the arrangement would not violate section 504. On the other hand, it would violate the regulation if the same institutions set up a consortium under which one college undertook to make its biology lab accessible, another its physics lab, and a third its chemistry lab, and under which mobility-impaired handicapped students (but not other students) were required to attend the particular college that is accessible for the desired courses.

Similarly, while a public school district need not make each of its buildings completely accessible, it may not make only one facility or part of a facility accessible if the result is to segregate handicapped students in a single setting.

All recipients that provide health, welfare, or other social services may also comply with § 104.22 by delivering services at alternate accessible sites or making home visits. Thus, for example, a pharmacist might arrange to make home deliveries of drugs. Under revised § 104.22(c), small providers of health, welfare, and social services (those with fewer than fifteen employees) may refer a beneficiary to an accessible provider of the desired service, but only if no means of meeting the program accessibility requirement other than a significant alteration in existing facilities is available. The referring recipient has the responsibility of determining that the other provider is in fact accessible and willing to provide the service.

A recent change in the tax law may assist some recipients in meeting their obligations under this section. Under section 2122 of the Tax Reform Act of 1976, recipients that pay federal income tax are eligible to claim a tax deduction of up to $25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons. See 42 FR 17870 (April 4, 1977), adopting 26 CFR 7.190.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers. The Department is ready at all times to provide technical assistance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with § 104.22(d).

The regulation continues to provide, as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three-year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but § 104.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See § 104.4(c)(2)(iv), prohibiting unnecessarily separate treatment; § 104.35, requiring that students in elementary and secondary schools be educated in the most integrated setting appropriate to their needs; and new § 104.43(d), applying the same standard to postsecondary education.

We have received some comments from organizations of handicapped persons on the subject of requiring, over an extended period of time, a barrier-free environment—that is, requiring the removal of all architectural barriers in existing facilities. The Department has considered these comments but has decided to take no further action at this time concerning these suggestions, believing that such action should only be considered in light of experience in implementing the program accessibility standard.

21. *New construction.* Section 104.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a manner so as to make the facility accessible to and usable by handicapped persons. Section 104.23(a) has been amended so that it applies to each newly constructed facility if the construction was commenced after the effective date of the regulation. The words "if construction has commenced" will be considered to mean "if groundbreaking has taken place." Thus, a

recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

Paragraph (b) requires certain alterations to conform to the requirement of physical accessibility in paragraph (a). If an alteration is undertaken to a portion of a building the accessibility of which could be improved by the manner in which the alteration is carried out, the alteration must be made in that manner. Thus, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of altering ceilings, the provisions of this section are not applicable because this alteration cannot be done in a way that affects the accessibility of that portion of the building. The phrase "to the maximum extent feasible" has been added to allow for the occasional case in which the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate the building in a manner that results in its being entirely barrier-free. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

As proposed, § 104.23(c) required compliance with the American National Standards Institute (ANSI) standard on building accessibility as the minimum necessary for compliance with the accessibility requirement of §§104.23 (a) and (b). The reference to the ANSI standard created some ambiguity, since the standard itself provides for waivers where other methods are equally effective in providing accessibility to the facility. Moreover, the Secretary does not wish to discourage innovation in barrier-free construction by requiring absolute adherence to a rigid design standard. Accordingly, § 104.23 (c) has been revised to permit departures from particular requirements of the ANSI standard where the recipient can demonstrate that equivalent access to the facility is provided.

Section 104.23(d) of the proposed regulation, providing for a limited deferral of action concerning facilities that are subject to section 502 as well as section 504 of the Act, has been deleted. The Secretary believes that the provision is unnecessary and inappropriate to this regulation. The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

SUBPART D—PRESCHOOL, ELEMENTARY, AND SECONDARY EDUCATION

Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. In this context, the term "adult education" refers only to those educational programs and activities for adults that are operated by elementary and secondary schools.

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, §§ 104.32 and 104.33 apply only to public programs and § 104.39 applies only to private programs; §§ 104.35 and 104.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in *Mills* v. *Board of Education of the District of Columbia*, 34 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania*, 344 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and *Lebanks* v. *Spears*, 60, F.R.D. 13 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Pub. L. 94-142 (the EHA).

The basic requirements common to those cases, to the EHA, and to this regulation are (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguard be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

22. *Location and notification.* Section 104.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by section 504 and this regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Under § 104.33(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 104.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be consistent with the requirements of § 104.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new § 104.33(b)(2) has been added, which allows this requirement to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of § 104.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in § 104.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

If the recipient places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and nonmedical care (including custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

Two new sentences have been added to paragraph (c)(1) to make clear that a recipient's financial obligations need not be met solely through its own funds. Recipients may rely on funds from any public or private source including insurers and similar third parties.

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to § 104.33. Section 104.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of § 104.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. *Educational setting.* Section 104.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under § 104.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 104.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under § 104.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under §§ 104.34 and 104.36.

New paragraph (b) specified that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.

Section 104.34(c) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent of the provision. A separate facility violates section 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for severely retarded persons), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. *Evaluation and placement.* Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, § 104.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in §§ 104.35 and 104.36, are concerned with testing and other evaluation methods and with procedural due process rights.

Section 104.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. "Any action" includes denials of placement.

Paragraphs (b) and (c) of § 104.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in "Issues in the Classification of Children," a report by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force participated. The provisions of these paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

Paragraph (b) has been shortened but not substantively changed. The requirement in former subparagraph (1) that recipients provide and administer evaluation materials in the native language of the student has been deleted as unnecessary, since the same requirement already exists under title VI and is more appropriately covered under that statute. Paragraphs (1) and (2) are, in general, intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests. Subparagraph (3) requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion of the test results by the impairment. Former subparagraph (4) has been deleted as unnecessarily repetitive of the other provisions of this paragraph.

Paragraph (c) requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, it requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.) Information from all sources must be documented and considered by a group of persons, and the procedure must ensure that the child is placed in the most integrated setting appropriate.

The proposed regulation would have required a complete individual reevaluation of the student each year. The Department has concluded that it is inappropriate in the section 504 regulation to require full reevaluations on such a rigid schedule. Accordingly, § 104.35(c) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three-year intervals except under certain specified circumstances.

Under § 104.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services. This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed section 504 regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

26. *Nonacademic services.* Section 104.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the provisions of § 104.34, be provided in the most integrated setting appropriate.

Revised paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities. Most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course.

Finally, the one-year transition period provided in a proposed section was deleted in response to the almost unanimous objection of commenters to that provision.

27. *Preschool and adult education.* Section 104.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to section 504, has been deleted as unnecessary, since it is comprehended by paragraph (a).

28. *Private education.* Section 104.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs; second, under § 104.39(b), they may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of § 104.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for mentally retarded persons is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

SUBPART E—POSTSECONDARY EDUCATION

Subpart E prescribes requirements for nondiscrimination in recruitment, admission, and treatment of students in postsecondary education programs and activities, including vocational education.

29. *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in § 104.42(a), the regulation delineates, in § 104.42(b), specific prohibitions concerning the establishment of limitations on admission of handicapped students, the use of tests or selection criteria, and preadmission inquiry. Several changes have been made in this provision.

Section 104.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been validated as a predictor of academic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that § 104.42(b)(2)(ii) could be interpreted to require a "global search" for alternate tests that do not have a disproportionate, adverse impact on handicapped persons. This was not the intent of the provision and, therefore, it has been amended to place the burden on the Assistant Secretary for Civil Rights, rather than on the recipient, to identify alternate tests.

Second, a new paragraph (d), concerning validity studies, has been added. Under the proposed regulation, overall success in an education program, not just first-year grades, was the criterion against which admissions tests were to be validated. This approach has been changed to reflect the comment of professional testing services that use of first year grades would be less disruptive of present practice and that periodic validity studies against overall success in the education program would be sufficient check on the reliability of first-year grades.

Section 104.42(b)(3) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are not able to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 104.42(b)(3)(iii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this context, "on the whole" means that not all of the facilities need be accessibile so long as a sufficient number of facilities are available to handicapped persons.

Revised § 104.42(b)(4) generally prohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of § 104.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

New paragraph (c) parallels the section on preemployment inquiries and allows postsecondary institutions to inquire about applicants' handicaps before admission, subject to certain safeguards, if the purpose of the inquiry is to take remedial action to correct past discrimination or to take voluntary action to overcome the limited participation of handicapped persons in postsecondary educational institutions.

Proposed § 104.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary, and it has been deleted.

30. *Treatment of students.* Section 104.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers in elementary or secondary schools not operated by the college. Under the "as a whole" wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions by the recipient that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

31. *Academic adjustments.* Paragraph (a) of § 104.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It shoud be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

Paragraph (b) provides that postsecondary institutions may not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or braillers in classrooms and dog guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright.

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§ 104.42(b)) and will be similarly interpreted.

Under § 104.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library.

32. *Housing.* Section 104.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in Subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing available to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§ 106.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with § 104.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33. *Health and insurance.* A proposed section, providing that recipients may not discriminate on the basis of handicap in the provision of health related services, has been deleted as duplicative of the general provisions of § 104.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized services and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them.

34. *Financial assistance.* Section 104.46(a), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under wills, trusts, or similar legal instruments in a discriminatory manner are permissible, but only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

It will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unable to qualify for the award. For example, a student who has a neurological disorder might be denied a varsity football scholarship on the basis of his inability to play football, but a deaf person could not, on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied a scholarship on the basis of comparative diving ability.

Commenters on § 104.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to those raised under § 104.43(b), concerning cooperative programs. This paragraph has been changed in the same manner as § 104.43(b) to include the "as a whole" concept and will be interpreted in the same manner as § 104.43(b).

35. *Nonacademic services.* Section 104.47 establishes nondiscrimination standards for physical education and athletics counseling and placement services, and social organizations. This section sets the same standards as does § 104.38 of Subpart D, discussed above, and will be interpreted in a similar fashion.

SUBPART F—HEALTH, WELFARE, AND SOCIAL SERVICES

Subpart F applies to recipients that operate health, welfare, and social service programs. The Department received fewer comments on this subpart than on others.

Although many commented that Subpart F lacked specificity, these commenters provided neither concrete suggestions nor additions. Nevertheless, some changes have been made, pursuant to comment, to clarify the obligations of recipients in specific areas. In addition, in an effort to reduce duplication in the regulation, the section governing recipients providing health services has been consolidated with the section regulating providers of welfare and social services. Since the separate provisions that appeared in the proposed regulation were almost identical, no substantive change should be inferred from their consolidation.

Several commenters asked whether Subpart F applies to vocational rehabilitation agencies whose purpose is to assist in the rehabilitation of handicapped persons. To the extent that such agencies receive financial assistance from the Department, they are covered by Subpart F and all other relevant subparts of the regulation. Nothing in this regulation, however, precludes such agencies from servicing only handicapped persons. Indeed, § 104.4(c) permits recipients to offer services or benefits that are limited by federal law to handicapped persons or classes of handicapped persons.

Many comments suggested requiring state social service agencies to take an active role in the enforcement of section 504 with regard to local social service providers. The Department believes that the possibility for federal-state cooperation in the administration and enforcement of section 504 warrants further consideration.

A number of comments also discussed whether section 504 should be read to require payment of compensation to institutionalized handicapped patients who perform services for the institution in which they reside. The Department of Labor has recently issued a proposed regulation under the Fair Labor Standards Act (FLSA) that covers the question of compensation for institutionalized persons. 42 FR 15224 (March 18, 1977). This Department will seek information and comment from the Department of Labor concerning that agency's experience administering the FLSA regulation.

36. *Health, welfare, and other social service providers.* Section 104.52(a) has been expanded in several respects. The addition of new paragraph (a)(2) is intended to make clear the basic requirement of equal opportunity to receive benefits or services in the health, welfare, and social service areas. The paragraph parallels §§ 104.4(b)(ii) and 104.43(b). New paragaph (a)(3) requires the provision of effective benefits or services, as defined in § 104.4(b)(2) (i.e., benefits or services which "afford handicapped persons equal opportunity to obtain the same result (or) to gain the same benefit * * *").

Section 104.52(a) also includes provisions concerning the limitation of benefits or services to handicapped persons and the subjection of handicapped persons to different eligibility standards. One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

Commenters had raised the question of whether the prohibition against different standards of eligibility might preclude recipients from providing special services to handicapped persons or classes of handicapped persons. The regulation will not be so interpreted, and the specific section in question has been eliminated. Section 104.4(c) makes clear that special programs for handicapped persons are permitted.

A new paragraph (a)(5) concerning the provision of different or separate services or benefits has been added. This provision prohibits such treatment unless necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

Section 104.52(b) has been amended to cover written material concerning waivers of rights or consent to treatment as well as general notices concerning health benefits or services. The section requires the recipient to ensure that qualified handicapped persons are not denied effective notice because of their handicap. For example, recipients could use several different types of notice in order to reach persons with impaired vision or hearing, such as brailled messages, radio spots, and tacticle devices on cards or envelopes to inform blind persons of the need to call the recipient for further information.

Section 104.52(c) is a new section requiring recipient hospitals to establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care. Although it would be appropriate for a hospital to fulfill its responsibilities under this section by having a full-time interpreter for the deaf on staff, there may be other means of accomplishing the desired result of assuring that some means of communication is immediately available for deaf persons needing emergency treatment.

Section 104.52(c), also a new provision, requires recipients with fifteen or more employees to provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills. Further, the Assistant Secretary may require a small provider to furnish auxiliary aids where the provision of aids would not adversely affect the ability of the recipient to provide its health benefits or service.

37. *Treatment of Drug Addicts and Alcoholics.* Section 104.53 is a new section that prohibits discrimination in the treatment and admission of drug and alcohol addicts to hospitals and outpatient facilities. Section 104.53 prohibits discrimination against drug abusers by operators of outpatient facilities, despite the fact that section 407 pertains only to hospitals, because of the broader application of section 504. This provision does not mean that all hospitals and outpatient facilities must treat drug addiction and alcoholism. It simply means, for example, that a cancer clinic may not refuse to treat cancer patients simply because they are also alcoholics.

38. *Education of institutionalized persons.* The regulation retains § 104.54 of the proposed regulation that requires that an appropriate education be provided to qualified handicapped persons who are confined to residential institutions or day care centers.

Subpart G—Procedures

In § 104.61, the Secretary has adopted the title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedureal regulation applicable to all of the civil rights statutes and executive orders administered by the Department.

Appendix B to Part 104—Guidelines for Eliminating Discrimination and Denial Of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs

Editorial Note: For the text of these guidelines, see 34 CFR Part 100, Appendix B.

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

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SUBJECT INDEX TO TITLE IX PREAMBLE AND REGULATION

APPENDIX A—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS [NOTE]

SOURCE: 45 FR 30955, May 9, 1980, unless otherwise noted.

Subpart A—Introduction

§ 106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Educatio Amendments of 1972, as amended b Pub. L. 93-568, 88 Stat. 1855 (excep sections 904 and 906 of those Amend ments) which is designed to eliminat (with certain exceptions) discrimina tion on the basis of sex in any educa tion program or activity receiving Fed eral financial assistance, whether o not such program or activity is offere or sponsored by an educational institu tion as defined in this part. This par is also intended to effectuate sectio 844 of the Education Amendments o 1974, Pub. L. 93-380, 88 Stat. 484. Th effective date of this part shall be Jul 21, 1975.

(Authority: Secs. 901, 902, Educatio Amendments of 1972, 86 Stat. 373, 374; 2 U.S.C. 1681, 1682, as amended by Pub. L. 9 568, 88 Stat. 1855, and sec. 844, Educatio Amendments of 1974, 88 Stat. 484, Pub. L 93-380)

§ 106.2 Definitions.

As used in this part, the term:

(a) *"Title IX"* means title IX of th Education Amendments of 1972, Pub L. 92-318, as amended by section 3 o Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *"Department"* means the Department of Education.

(c) *"Secretary"* means the Secretar of Education.

(d) *"Assistant Secretary"* means the Assistant Secretary for Civil Rights o the Department.

(e) *"Reviewing Authority"* means that component of the Departmen delegated authority by the Secretar to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *"Administrative law judge"* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *"Recipient"* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) *"Applicant"* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) *"Educational institution"* means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) *"Institution of graduate higher education"* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) *"Institution of undergraduate higher education"* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) *"Institution of professional education"* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(n) *"Institution of vocational education"* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(o) *"Administratively separate unit"* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) *"Admission"* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) *"Student"* means a person who has gained admission.

(r) *"Transition plan"* means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980; 45 FR 37426, June 3, 1980]

§ 106.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(1) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Assistant Secretary upon request, a description of any modifications made pursuant to paragraph (c) (ii) of this section and of any remedial steps taken pursuant to paragraph (c) (iii) of this section.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980]

§ 106.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of Subpart B of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Authority: Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Assistant Secretary finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 106.8, or to the Assistant Secretary.

(2) Each recipient shall make the initial notification required by paragraph (a) (1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in:

(i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart B—Coverage

§ 106.11 Application.

Except as provided in this subpart, this Part 106 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 86298, Dec. 30, 1980]

§ 106.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; sec. 3(a) of P.L. 93-568, 88 Stat. 1862 amending Sec. 901)

§ 106.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§ 106.16 and 106.17, and Subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of Subpart C.* Except as provided in paragraphs (d) and (e) of this section, Subpart C applies to each recipient. A recipient to which Subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, Subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 45 FR 86298, Dec. 30, 1980]

§ 106.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which Subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the Secretary as described in § 106.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.17 Transition plans.

(a) *Submission of plans.* An institution to which § 106.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 106.16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 106.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 106.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 106.16 and 106.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admision, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 106.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 106.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

§ 106.31 Education programs and activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for instate fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient;

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 47 FR 32527, July 28, 1982]

§ 106.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Authority: Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

§ 106.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 106.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.35 Access to schools operated by LEAs.

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 106.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates Subpart E of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as

provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 106.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

§ 106.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 106.61.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.56 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 106.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart F—Procedures [Interim]

§ 106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR, Part 101.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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APPENDIX A—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

EDITORIAL NOTE: For the text of these guidelines, see 34 CFR Part 100, Appendix B.

[44 FR 17168, Mar. 21, 1979]

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AUTHORITY: 20 U.S.C. 2701-2731, 2821-2838, 2851-2854, 2891-2901, unless otherwise noted.

SOURCE: 54 FR 21756, May 19, 1989, unless otherwise noted.

Subpart A—General

§ 200.1 What is the Chapter 1 Program in Local Educational Agencies?

(a) Under the Chapter 1 Program in Local Educational Agencies (LEAs)—referred to in this part as the Chapter 1 LEA Program—the Secretary provides Federal financial assistance for projects designed to meet the special educational needs of—

(1) Educationally deprived children in LEAs;

(2) Children in local institutions for neglected or delinquent children, including children in local correctional institutions; and

(3) Educationally deprived Indian children under section 1005(d) of the Act.

(b)(1) The purpose of assistance under this part is to improve the educational opportunities of educationally deprived children by helping these children—

(i) Succeed in the regular program of the LEA;

(ii) Attain grade-level proficiency; and

(iii) Improve achievement in basic and more advanced skills.

(2) The purpose is accomplished through means such as supplemental education programs, schoolwide programs, and the increased involvement of parents in their children's education.

(Authority: 20 U.S.C. 2701)

§ 200.2 Who is eligible for a grant?

The Secretary provides funds under the Chapter 1 LEA Program to—

(a) States, through their respective State educational agencies (SEAs); and

(b) The Secretary of the Interior for Indian children referred to in § 200.1(a)(3).

(Authority: 20 U.S.C. 2711-2712)

§ 200.3 Who is eligible for a subgrant?

(a) *General rule.* (1) Except as provided in paragraph (d) of this section, an LEA that qualifies under paragraph (b) or (c) of this section is eligible for a subgrant under the chapter 1 LEA Program.

(2) An SEA provides two types of subgrants—basic grants and concentration grants—to qualifying LEAs.

(b) *Basic grants.* An LEA is eligible for a basic grant if—

(1) There are at least 10 children counted under section 1005(c) of the Act in the school district of the LEA; or

(2) Satisfactory data on a school district basis are not available but the school district served by the LEA is located, in whole or in part, in a county in which there are at least 10 children counted under section 1005(c) of the Act.

(c) *Concentration grants.* (1) An LEA is eligible for a concentration grant if—

(i) The LEA is eligible for a basic grant under paragraph (b) of this section;

(ii) The school district of the LEA is located, in whole or in part, in a county in which the number of children counted under section 1005(c) of the Act in the school districts of LEAs in the county in the preceding fiscal year exceeds—

(A) 6,500; or

(B) 15 percent of the total number of children aged 5 to 17, inclusive, in the school districts of LEAs in the county in the preceding fiscal year; and

(iii) The number of children counted for purposes of § 200.23 or § 200.24 in the preceding fiscal year in the school district of the LEA exceeds—

(A) 6,500; or

(B) 15 percent of the total number of children aged 5 to 17, inclusive in the school district of the LEA in the preceding fiscal year.

(2) An LEA that does not qualify for a concentration grant under paragraph (c)(1) of this section may receive a concentration grant under § 200.25(b).

(d) *Exception.* This section does not apply to Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Secretary of the Interior.

(Authority: 20 U.S.C. 2711-2712)

§ 200.4 What kind of activities may an LEA conduct?

(a) Under the Chapter 1 LEA Program, an LEA may conduct only projects that are designed to provide supplemental services to meet the special educational needs of educationally deprived children at the preschool, elementary, and secondary school levels.

(b) An LEA is encouraged to—

(1) Develop programs to assist participating children to improve achievement in basic and more advanced skills; and

(2) Consider year-round services and activities, including intensive summer school programs.

(c) Authorized activities to meet the special educational needs of educationally deprived children include—

(1) Acquisition of equipment and instructional materials;

(2) Acquisition of books and school library resources;

(3) Employment of special instructional personnel, school counselors, and other pupil services personnel;

(4) Employment and training of education aides;

(5) Payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools serving project areas;

(6) Training of teachers, librarians, other instructional and pupil services personnel, and, as appropriate, early childhood education professionals;

(7) Construction, if necessary, of school facilities;

(8) Parental involvement activities;

(9) Planning for and evaluation of Chapter 1 projects; and

(10) Other allowable activities.

(d)(1) With the approval of the SEA, an LEA may use up to and including five percent of the funds the LEA receives under §§ 200.22 through 200.26 for innovation projects to promote quality in the Chapter 1 LEA Program.

(2) Innovation projects may include only the following:

(i) Notwithstanding § 200.31(a), the continuation of services to children who received Chapter 1 services in any preceding year for a period sufficient to maintain progress made during the period of their participation in the program.

(ii) Notwithstanding § 200.31(c)(1), the provision of continued services, for a period not to exceed two additional years, to children participating in a Chapter 1 project who are transferred to ineligible areas or schools as part of a desegregation plan.

(iii) Incentive payments to schools that have demonstrated significant progress and success in attaining the goals of this part.

(iv) Training of teachers paid with funds under this part and teachers and librarians paid with other funds with respect to the special educational needs of eligible children and integration of activities under this part into regular classroom programs.

(v) Programs to encourage innovative approaches to parental involvement or rewards to or expansion of exemplary parental involvement programs.

(vi) Encouraging the involvement of community and private sector resources (including fiscal resources) in meeting the needs of eligible children.

(vii) Assistance by LEAs of schools identified under § 200.38(b).

(3) Except as provided in paragraph (d)(2) (i)-(ii) of this section, the requirements of this part apply to innovation projects conducted under this section.

(Authority: 20 U.S.C. 2721)

§ 200.5 What regulations apply to the Chapter 1 LEA Program?

The following regulations apply to the Chapter 1 LEA Program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR Part 76 (State-Administered Programs) as follows:

(i) Subpart A (General), except for § 76.3 (ED general grant regulations apply to these programs).

(ii) Sections 76.125 through 76.137 (Consolidated Grant Applications for Insular Areas).

(iii) Section 76.401 (Disapproval of an application—opportunity for a hearing).

(iv) Subpart F (What Conditions Must Be Met by the State and Its Subgrantees?), except for the following sections:

(A) Sections 76.580-76.581 (Coordination).

(B) Sections 76.650 through 76.662 (Participation of Students Enrolled in Private Schools).

(C) Section 76.684 (Day care services).

(D) Section 76.690 (Energy conservation awareness).

(v) Subpart G (What Are the Administrative Responsibilities of the State and Its Subgrantees?), except for the following sections:

(A) Sections 76.770 through 76.772 (State Administrative Responsibilities).

(B) Section 76.780 (A State shall adopt complaint procedures).

(C) Section 76.781 (Minimum complaint procedures).

(D) Section 76.782 (An organization or individual may file a complaint).

(vi) Subpart H (What Procedures Does the Secretary Use to Get Compliance?).

(2) 34 CFR Part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR Part 78 (Education Appeal Board).

(4) 34 CFR Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), unless a State formally adopts its own written fiscal and administrative requirements for expending and accounting for all funds received by SEAs and LEAs under this part. These requirements must be available for Federal inspection and must—

(i) Be sufficiently specific to ensure that funds received under this part are used in compliance with all applicable statutory and regulatory provisions;

(ii) Ensure that funds received under this part are only spent for reasonable and necessary costs of operating programs under this part; and

(iii) Ensure that funds received under this part are not used for general expenses required to carry out other responsibilities of State or local governments.

(5) 34 CFR Part 81 (General Education Provisions Act—Enforcement).

(6) 34 CFR part 85 (Governmentwide Debarment and Suspension (Non-

procurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(b) The regulations in this Part 200.

(Authority: 20 U.S.C. 2831(a))

[54 FR 21756, May 19, 1989, as amended at 54 FR 43232, Oct. 23, 1989]

§ 200.6 What definitions apply to the Chapter 1 LEA Program?

(a) *Definitions in the Elementary and Secondary Education Act.* The following terms used in this part are defined in section 1471 of the Act:

Average daily attendance
Construction
County
Effective schools programs
Elementary school
Equipment
Free public education
Local educational agency (LEA)
More advanced skills
Parent advisory council
Project area
Pupil services
Pupil services personnel
School facilities
Secondary school
Secretary
State
State educational agency (SEA)

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Acquisition
Application
Department
EDGAR
GEPA
Grant
Minor remodeling
Personal property
Private
Project
Public
Real property
Subgrant
Supplies

(c) *Other definitions.* The following definitions also apply to this part:

Act means the Elementary and Secondary Education Act of 1965, as amended (ESEA).

Aggregate performance means educational achievement of children participating in programs under this part, aggregated for a school as a whole, measured in accordance with the national evaluation standards in Subpart H.

Chapter 1 means Chapter 1 of Title I of the Act.

Children means persons—

(1) Up to age 21 who are entitled to a free public education through grade 12; or

(2) Who are of preschool age.

Desired outcomes—

(1) Means an LEA's goals to improve the educational opportunities of educationally deprived children to help those children—

(i) Succeed in the regular educational program of the LEA;

(ii) Attain grade-level proficiency; and

(iii) Improve achievement in basic and more advanced skills;

(2) At a minimum, must be expressed in terms of aggregate performance in accordance with § 200.38(b)(1)(ii).

(3) May also be expressed in terms of other indicators such as—

(i) Improved student performance measured by criterion-referenced tests;

(ii) Lower dropout rates;

(iii) Improved attendance; and

(iv) Fewer retentions in grades.

ECIA means the Education Consolidation and Improvement Act of 1981.

Educationally deprived children means children whose educational attainment is below the level that is appropriate for children of their age.

Fiscal year means the Federal fiscal year—a period beginning on October 1 and ending on the following September 30—or another 12-month period normally used by the SEA for recordkeeping.

Institution for delinquent children means, as determined by the SEA, a public or private residential facility that is operated primarily for the care of children who have been determined to be delinquent or in need of supervision.

Institution for neglected children means, as determined by the SEA, a public or private residential facility—other than a foster home—that is operated primarily for the care of children who have been committed to the institution—or voluntarily placed in the institution under applicable State law—because of the abandonment by, neglect by, or death of parents.

Parent. (1) The term includes a legal guardian or other person standing in loco parentis.

(2) "In loco parentis" means a person acting in place of a parent or legal guardian, and may include a person such as a grandparent, stepparent, aunt, uncle, older sibling, or other person either—

(i) With whom a child lives; or

(ii) Who has been designated by a parent or legal guardian to act in place of the parent or legal guardian regarding all aspects of the child's education.

Preschool children means children who are—

(1) Below the age or grade level at which the LEA provides a free public education; and

(2) Of the age or grade level at which they can benefit from an organized instructional program provided in a school or other educational setting.

School attendance area. (1) This term means, in relation to a particular public school, the geographic area in which the children who are normally served by that school reside.

(2) If a child's school attendance area cannot be determined on a geographic basis, the child is considered to be in the school attendance area of the school to which the child is assigned or would be assigned if the child were not attending a private school or another public school on a voluntary basis.

(Authority: 20 U.S.C. 2831(a), 2891)

§§ 200.7—200.9 [Reserved]

Subpart B—How Does a State Apply for and Receive a Grant?

§ 200.10 What assurances must a State submit to receive a grant?

(a) A State that wishes to receive funds under this part for projects designed to meet the special educational needs of educationally deprived children shall submit to the Secretary, through its SEA, assurances that the SEA—

(1) Will meet the requirements in section 435(b) (2) and (5) of the General Education Provisions Act (GEPA) relating to fiscal control and fund accounting procedures;

(2) Will carry out the activities in § 200.35 (evaluation) and §§ 200.37-200.38 (school program improvement);

(3) Has on file a program improvement plan that meets the requirements of § 200.37(a); and

(4) Will ensure that its LEAs comply with all applicable statutory and regulatory requirements.

(b) The assurances submitted under paragraph (a) of this section remain in effect for the duration of the SEA's participation in the Chapter 1 LEA Program.

(Authority: 20 U.S.C. 2722(a))

§§ 200.11—200.19 [Reserved]

Subpart C—How Does an LEA Apply for and Receive a Subgrant?

§ 200.20 How does an LEA apply for a subgrant?

(a) *Contents of an application.* An LEA may receive a subgrant under this part for any fiscal year if the LEA has on file with the SEA an application that contains the following:

(1) A description of the procedures to be used to conduct an annual assessment of educational needs that meets the requirements of § 200.31(b).

(2) A rank ordering of eligible school attendance areas, including the identification of project areas and the basis for the selection of each project area.

(3) A description of the Chapter 1 project to be conducted, including a budget of proposed expenditures for services to public and private school children for the initial project year.

(4) A description of—

(i) The desired outcomes for children participating in the Chapter 1 project, in terms of basic and more advanced skills that all children are expected to master, that will be a basis for evaluating the project under § 200.35; and

(ii) How the LEA will measure substantial progress toward meeting the desired outcomes.

(5) A description of the services to be provided to—

(i) Eligible children enrolled in private elementary and secondary schools to ensure equitable participation of those children in accordance with §§ 200.50-200.55; and

(ii) Children in local institutions for neglected or delinquent children, including children in local correctional institutions.

(6) A description of any innovation projects the LEA proposes to conduct.

(7) Data showing that the LEA has maintained fiscal effort in accordance with § 200.41 if those data are not otherwise available to the SEA.

(8) If appropriate, the assurance concerning comparability of services in § 200.43(c)(1)(i).

(9) The assurances required under section 436(b) (2) and (3) of GEPA relating to fiscal control and fund accounting procedures.

(10)(i) Assurances that the LEA's Chapter 1 projects—

(A) Are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the children being served;

(B) Are designed and implemented in consultation with teachers (including early childhood professionals, pupil services personnel, and librarians, if appropriate);

(C) Provide for parental involvement in accordance with § 200.34;

(D) Provide for the allocation of time and resources for frequent and regular coordination between Chapter 1 staff and the regular staff to ensure that both the Chapter 1 and regular instructional programs meet the special educational needs of children participating in programs under this part; and

(E) Provide maximum coordination between Chapter 1 services and services provided to address children's handicapping conditions or limited English proficiency; and

(ii) With the least possible paperwork and burden, additional information an SEA finds necessary to ensure compliance with these assurances.

(b) *Development and approval of application.* An application must be—

(1) Developed in consultation with parents and teachers; and

(2) Approved by the SEA under § 200.21.

(c) *Frequency of submission.* (1) An LEA shall submit to the SEA an application prior to each project period.

(2) A project period may cover a period of not more than three years.

(d) *Annual updating of information in the application.* An LEA shall annually update its application by submitting to the SEA—

(1) Information on eligible school attendance areas and the selection of project areas required in paragraph (a)(2) of this section;

(2) Data showing that the LEA has maintained fiscal effort in accordance with § 200.41 if those data are not otherwise available to the SEA: and

(3) A budget of proposed expenditures for services to public and private school children under this part for the project year.

(e) *Further updating of information in the application.* If there are substantial changes in the number or needs of the children to be served or the services to be provided, an LEA shall submit a description of the changes to the SEA.

(Approved by the Office of Management and Budget under control number 1810-0504)

(Authority: 20 U.S.C. 2721(b), 2722 (b)-(c), 2723, 2728 (a), (c), 2838(c))

[54 FR 21756, May 19, 1989; 54 FR 27793, June 30, 1989, as amended at 54 FR 30737, July 24, 1989]

§ 200.21 Under what conditions does an SEA approve an LEA's application?

(a) *Standards for approval.* An SEA shall approve an LEA's application for a subgrant if—

(1) The application meets the requirements in § 200.20; and

(2) The SEA determines that the LEA—

(i) Maintained fiscal effort in accordance with § 200.41; or

(ii) Has modified its application to take into account its reduced allocation if the LEA failed to maintain effort.

(b) *Effect of SEA approval.* SEA approval of an application under paragraph (a) of this section does not relieve the LEA of its responsibility to comply with all applicable requirements.

(Authority: 20 U.S.C. 2722, 2728(a))

ALLOCATION OF BASIC GRANTS

§ 200.22 How does an SEA allocate funds for basic grants to an LEA?

(a) If the Secretary determines the amount of funds that each LEA in a State is eligible to receive under section 1005(a)(2)(A) of the Act, an SEA shall allocate that amount to each LEA within the State.

(b) If the Secretary determines county aggregate amounts under section 1005(a)(2)(B) of the Act, the SEA shall allocate those county aggregate amounts to LEAs in accordance with §§ 200.23–200.24.

(Authority: 20 U.S.C. 2711(a))

[54 FR 21756, May 19, 1989; 54 FR 27793, June 30, 1989]

§ 200.23 How does an SEA allocate county aggregate amounts?

Except as provided in § 200.24, an SEA shall allocate county aggregate amounts to LEAs as follows:

(a) *Allocations based on children in local institutions for neglected or delinquent children.* (1)(i) Except as provided in paragraphs (a)(2), (3), and (4) of this section the SEA shall first allocate to a particular LEA that portion, if any, of the county aggregate amount that is based on the total number of children aged 5 to 17, inclusive, in the LEA's school district who resided in a local institution for neglected or delinquent children—and were not counted under Subpart 3 of Part D of Chapter 1 (programs for neglected or delinquent children operated by State agencies)—for at least 30 consecutive days, at least one day of which was in the month of October of the preceding fiscal year.

(ii) For the purpose of this section, the SEA shall consider children who are in local correctional institutions to be residing in institutions for delinquent children.

(2) If the SEA determines that the LEA is unable or unwilling to provide for the special educational needs of the children referred to in paragraph (a)(1) of this section, the SEA shall—

(i) Reduce the LEA's allocation by the amount that is based on those children, including any concentration grant funds generated by those children; and

(ii) Assign that portion of the LEA's allocation to—

(A) The SEA if the SEA assumes educational responsibility for those children; or

(B) Another State agency or LEA that agrees to assume educational responsibility for those children.

(3) If no public agency is willing to assume educational responsibility for the children referred to in paragraph (a)(1) of this section, the SEA may not reallocate to any other LEA that portion of the LEA's allocation that is based on those children.

(4) If a local institution for neglected or delinquent children closes and the children are transferred to an institution in the school district of another LEA, the SEA shall adjust the allocations of the two LEAs to reflect the transfer.

(b) *Allocations based on the distribution of children from low-income families*—(1) *General rule.* (i) After following the procedures in paragraph (a) of this section, the SEA shall allocate the remaining county aggregate amount to LEAs in the county on the basis of the best available data on the number of children from low-income families in the school districts of those LEAs.

(ii) The SEA shall determine the number of children from low-income families in the school districts of the LEAs in the county by using the same measure of low-income throughout the State.

(iii) In accordance with section 1403(a) of the Act, an LEA's allocation under paragraphs (a) and (b)(1)(i) of this section may not be less than 85 percent of the allocation it received for the previous fiscal year.

(2) *Special circumstances.* The SEA shall adjust the allocations it makes under paragraph (b)(1) of this section to reflect the following special circumstances:

(i) *LEAs in more than one county.* If a school district of an LEA overlaps a county boundary, the SEA shall make, on a proportionate basis, a separate allocation to the LEA from the county aggregate amount for each county in which the school district of the LEA is located provided the aggregate number of children from low-income families in the LEA is 10 or more.

(ii) *LEAs serving children from another LEA.* If an LEA serves a substantial number of children within the same geographic area as another LEA, the SEA may adjust the allocations between the LEAs in a manner the SEA determines will best carry out the purposes of Chapter 1.

(iii) *Changes in LEAs.* If an LEA's school district is merged or consolidated, or a portion of the district is transferred to another LEA, the SEA may—

(A) Adjust the allocations for the affected LEAs to reflect the number of children from low-income families for whom each LEA is providing a free public education; or

(B) Permit an LEA that has submitted an approved application to carry out the project, by itself or in cooperation with another LEA, during the remainder of the fiscal year.

(3) *Minimum allocation.* The SEA is not required to allocate to an LEA a basic grant of funds under this part generated by fewer than 10 children.

(Approved by the Office of Management and Budget under control number 1810-0060)

(Authority: 20 U.S.C. 2711, 2822-2823)

[54 FR 21756, May 19, 1989; 54 FR 27793, June 30, 1989, as amended at 54 FR 30737, July 24, 1989]

§ 200.24 Are there exceptions to how an SEA allocates county aggregate amounts?

(a) In any State in which a large number of LEAs overlap county boundaries, the SEA may apply to the Secretary for authority to make allocations directly to LEAs without regard to counties.

(b) If an SEA allocates directly to LEAs under paragraph (a) of this section, the SEA shall use the same factors contained in section 1005(c) of the Act to determine the LEAs' allocations as the Secretary used to compute county aggregate amounts under section 1005(a)(2)(B) of the Act.

(c) An LEA dissatisfied with the determination by the SEA under this section may appeal directly to the Secretary for a final determination.

(Authority: 20 U.S.C. 2711)

ALLOCATION OF CONCENTRATION GRANTS

§ 200.25 How does an SEA allocate concentration grants to an LEA?

(a) *General rule.* (1) Except as provided in paragraph (b) of this section, an SEA shall allocate a county's concentration grant funds only to LEAs—

(i) Whose school districts lie, in whole or in part, within the county; and

(ii) That meet the eligibility criteria in § 200.3(c)(1).

(2) In allocating concentration grant funds under paragraph (a) of this section, the SEA shall distribute the funds to each LEA that is eligible to receive those funds in proportion to the current number of children counted for purposes of § 200.23 or § 200.24 in the school district of each LEA compared to the current number of those children in the school districts of all LEAs that are eligible for concentration grants in the county.

(b) *Exceptions.* (1)(i) An SEA may reserve not more than 2 percent of the amount of concentration grant funds it receives to make direct payments to LEAs that meet the criteria in § 200.3(c)(1) (i) and (iii) but are located in counties that are not eligible under § 200.3(c)(1)(ii).

(ii) If an SEA plans to reserve concentration grant funds under paragraph (b)(1)(i) of this section, the SEA, before allocating any concentration grant funds under paragraph (a) or (b) (2)-(3) of this section, shall—

(A) Determine which LEAs located in ineligible counties are eligible to receive concentration grant funds;

(B) Determine the appropriate amount to be reserved;

(C) Proportionately reduce the amount available for concentration grants for eligible counties or LEAs to provide the reserved amount;

(D) Rank order the LEAs eligible for concentration grant funds that are located in ineligible counties according to the number or percentage of children counted for purposes of § 200.23 or § 200.24 in the preceding fiscal year in each LEA;

(E) Select, in rank order, those LEAs that the SEA plans to provide concentration grant funds; and

(F) Distribute the reserved funds among the selected LEAs in proportion to the current number of children counted for purposes of § 200.23 or § 200.24 in the school district of each LEA compared to the current number of those children in all the school districts of the selected LEAs.

(2) In a county in which no LEA meets the eligibility criteria in § 200.3(c)(1)(iii), an SEA shall—

(i) Identify those LEAs in which either the number or percentage of children counted for purposes of § 200.23 or § 200.24 in the preceding fiscal year exceeds the average number or percentage of those children in the county; and

(ii) Allocate concentration grant funds for the county among the LEAs identified in paragraph (b)(2)(i) of this section in proportion to the current number of children counted for purposes of § 200.23 or § 200.24 in the school district of each LEA compared to the current number of those children in all the school districts of those LEAs.

(3) In a State that receives a minimum concentration grant under section 1006(a)(1)(B) of the Act, the SEA shall—

(i) Allocate concentration grant funds among LEAs in the State in accordance with the provisions in paragraphs (a) and (b) of this section; or

(ii) Without regard to the counties in which the LEAs are located—

(A) Identify those LEAs in which either the number or percentage of children counted for purposes of § 200.23 or § 200.24 in the preceding fiscal year exceeds the average number or percentage of those children in the State; and

(B) Allocate concentration grant funds among the LEAs identified in paragraph (b)(3)(ii)(A) of this section in proportion to the current number of children counted for purposes of § 200.23 or § 200.24 in the school district of each LEA compared to the current number of those children in all the school districts of all LEAs so identified.

(c) *Use of concentration grant funds.* (1) An LEA that receives concentration grant funds under this section shall use those funds to carry out activities described in its approved project aplication under § 200.20.

(2) The LEA is not required to account for concentration grant funds separately from basic grant funds.

(Authority: 20 U.S.C. 2712)

[54 FR 21756, May 19, 1989; 54 FR 27[illegible], June 30, 1989]

REALLOCATION

§ 200.26 How does an SEA reallocate funds?

(a) An SEA shall reallocate, on a timely basis, excess Chapter 1 funds provided under §§ 200.22-200.25—

(1) From an LEA that—

(i) Is not participating in the Chapter 1 LEA Program;

(ii) Has had its allocation reduced because it failed to meet the maintenance of effort requirements in § 200.41;

(iii) Has carryover funds that exceed the percentage limitation in § 200.46; or

(iv) Has excess funds for other reasons; or

(2) That the SEA has recovered after determining that an LEA has failed to spend funds received under this part in accordance with applicable law.

(b)(1) An SEA may reallocate excess Chapter 1 funds referred to in paragraph (a) of this section only to LEAs with the greatest need for those funds because of inequities in, or mitigating hardships caused by, application of the allocation formula in section 1005 of the Act.

(2) Factors that may cause inequities in the formula include—

(i) An increase since the most recent decennial census, caused by population shifts or changing economic conditions, in the number of children from low-income families.

(ii) Caseload data used in the allocation formula that are not representative of the number of neglected or delinquent children in local institutions; and

(iii) Other circumstances in which the statutory formula fails to reflect accurately the number or percentage of low-income children.

(c) The SEA shall develop procedures for reallocating excess Chapter 1 funds provided under §§ 200.22-200.25 that include the following three steps:

(1) A determination of which LEAs are eligible to receive additional funds as indicated by the presence of factors such as those in paragraph (b)(2) of this section. An LEA's eligibility must be based on inequity caused by the allocation formula.

(2) From among the eligible LEAs, a determination of which LEAs have the greatest need for funds. The SEA may consider such factors as—

(i) The degree of increase in the number or percentage of children from low-income families; and

(ii) An LEA's need for additional funds to provide Chapter 1 services to address the unmet needs of eligible Chapter 1 children.

(3) An establishment of timelines for reallocation.

(d)(1) An SEA may reallocate excess funds only during the Federal fiscal year for which the funds were appropriated or during the succeeding Federal fiscal year.

(2) Reallocation does not extend the period during which the excess funds are available for obligation.

(Authority: 20 U.S.C. 1225(b), 2823(b), 2832(b))

§§ 200.27—200.29 [Reserved]

Subpart D—What Project Requirements Apply to the Chapter 1 LEA Program?

§ 200.30 How does an LEA select school attendance areas to be project areas?

(a) *General rule.* (1) Except as provided in paragraphs (b) and (d) of this section, an LEA that receives Chapter 1 funds under this part shall conduct Chapter 1 projects in school attendance areas that have high concentrations of children from low-income families.

(2)(i) An LEA shall identify a school attendance area with a high concentration of children from low-income families as an eligible school attendance area if—

(A) The percentage of children from low-income families in that school attendance area is at least as high as the percentage of children from low-income families in the LEA as a whole; or

(B) The number of children from low-income families in that school attendance area is at least equal to the average number of children from low-income families per school attendance area in the LEA as a whole.

(ii) In identifying eligible areas, the LEA may use a combination of the methods in paragraph (a)(2)(i) of this section, except that the total number of eligible school attendance areas may not exceed the number the LEA would have identified as eligible if it had used only one of the methods.

(iii) If an LEA ranks its school attendance areas by grade span groupings under paragraph (a)(3)(i)(A) of this section, the LEA shall determine the percentage or average number of children from low-income families in the LEA as a whole for each grade span grouping.

(3) If funds available under this part are insufficient to provide programs and projects for all educationally deprived children in eligible school attendance areas, an LEA shall—

(i) Annually rank its eligible school attendance areas from highest to lowest according to relative degree of concentration of children from low-income families. The LEA may rank its school attendance areas—

(A) By grade span groupings; or

(B) For the entire LEA; and

(ii) Based on the needs of educationally deprived children identified under § 200.31(b) and the resources necessary to meet those needs, determine in rank order the number of eligible school attendance areas to be served.

(4) An LEA may carry out a Chapter 1 program or project in an eligible school attendance area only if it carries out a Chapter 1 program or project in all other eligible school attendance areas that are ranked higher under paragraph (a)(3) of this section.

(b) *Special rules.* Notwithstanding paragraph (a) of this section, an LEA may identify and rank eligible school attendance areas as follows:

(1) An LEA may designate as eligible and serve all school attendance areas within a grade span grouping or in the

entire LEA if the percentage of children from low-income families in each school attendance area is not more than five percentage points above or five percentage points below the average percentage of children from low-income families within a grade span grouping or within the entire LEA.

(2)(i) If the expenditure requirements in paragraph (b)(2)(ii) of this section are met, an LEA may designate as eligible any school attendance areas in which at least 25 percent of the children are from low-income families.

(ii)(A) Except as provided in paragraph (b)(2)(ii)(B) of this section, an LEA may use the provision in paragraph (b)(2)(i) of this section only if, in each school attendance area of the LEA in which Chapter 1 projects were carried out during the preceding year, the aggregate per pupil expenditures of funds available under this part and funds from a State program that meets the requirements of section 1018(d)(1)(B) of the Act in the current fiscal year equal or exceed the aggregate per pupil expenditures from those sources in the preceding fiscal year, provided that each school attendance area qualifies for the amount under the requirements in § 200.33.

(B) An LEA may expend in the current fiscal year in particular school attendance areas less than the aggregate per pupil amount required under paragraph (b)(2)(ii)(A) of this section if the LEA determines under § 200.33 that fewer resources are needed to meet the needs of children selected for participation in those attendance areas.

(3)(i) An LEA may designate a school that serves an ineligible school attendance area or serves more than one school attendance area as an eligible school if the proportion of children from low-income families in average daily attendance in that school is substantially equal to the proportion of children from low-income families in an eligible school attendance area.

(ii) If an LEA designates a school as eligible under paragraph (b)(3)(i) of this section, the LEA shall—

(A) Determine that the school complies with the school attendance area requirements in paragraph (a) of this section; and

(B) At its discretion, apply the special rules for identifying and ranking eligible school attendance areas in paragraph (b) of this section to the school.

(4) With the approval of the SEA, an LEA may designate as eligible and serve a school attendance area with a substantially higher number or percentage of educationally deprived children before school attendance areas with higher concentrations of children from low-income families if—

(i) The LEA does not serve more school attendance areas than could otherwise be served; and

(ii) The SEA determines that the selection of school attendance areas under paragraph (b)(4) of this section will not substantially impair the delivery of services to educationally deprived children from low-income families in project areas served by the LEA.

(5)(i) An LEA may continue to provide for one year Chapter 1 services in a school attendance area that is not eligible or is eligible but not selected under paragraph (a) of this section if that school attendance area was eligible and selected under the standards in paragraph (a) of this section in the immediately preceding year.

(ii) A school attendance area that continues to be served under paragraph (b)(5)(i) of this section may take the place of the lowest ranked but otherwise eligible school attendance area.

(6) With the approval of the SEA, an LEA may skip eligible school attendance areas that have higher proportions or numbers of children from low-income families if the children in those attendance areas are receiving, from non-Federal funds, services of the same nature and scope as would otherwise be provided under Chapter 1, except that the LEA shall—

(i) Determine the number of children in private elementary and secondary schools to receive Chapter 1 services without regard to non-Federal compensatory education funds used to serve eligible children in public elementary and secondary schools; and

(ii) Identify children in private schools to receive Chapter 1 services in accordance with the requirements in paragraphs (a) and (b) (1)-(5) of this section.

(c) For purposes of paragraphs (a) and (b) of this section, an LEA, on the basis of the best available data on children from low-income families, shall annually select and use the same measure of low income—which may be a composite of several indicators—to identify and rank eligible school attendance areas within a grade span grouping or for the entire LEA.

(d) *Exemptions.* An LEA does not have to comply with the requirements in this section but shall comply with the requirements in § 200.31 if the LEA has—

(1) A total enrollment of fewer than 1,000 children; or

(2) No more than one school attendance area at each grade span.

(Approved by the Office of Management and Budget under control number 1810-0504)

(Authority: 20 U.S.C. 2723 (a)-(b))

[54 FR 21756, May 19, 1989, as amended at 54 FR 30737, July 24, 1989]

§ 200.31 How does an LEA identify and select children to participate?

(a) *General rule.* Except as provided in paragraph (c) of this section and § 200.36, an LEA shall use funds available under this part only for educationally deprived children, identified under paragraph (b) of this section as having the greatest need for special assistance, in school attendance areas or schools selected under § 200.30.

(b) *Annual assessment of educational needs.* An LEA that receives funds under this part shall annually assess educational needs under this part as follows:

(1) Identify educationally deprived children, as defined in § 200.6(c), in all eligible school attendance areas, including educationally deprived children in private schools.

(2) On the basis of information obtained under paragraph (b)(1) of this section, including information concerning educationally deprived children in private schools, identify the general instructional areas and grade levels on which the program will focus. Instructional areas and grade levels may vary among and within school attendance areas if the needs assessment data support those variations.

(3) Establish educationally related objective criteria, which include written or oral testing instruments, for each grade level and instructional area to select educationally deprived children for participation in the Chapter 1 project.

(4) Uniformly apply the criteria required in paragraph (b)(3) of this section to particular grade levels throughout the LEA.

(5) Select for services those educationally deprived children who have the greatest need for special assistance.

(6) Determine—

(i) The special educational needs of participating children with sufficient specificity to ensure concentration on those needs; and

(ii) The resources such as personnel, instructional materials, and library resources necessary to meet those special educational needs.

(c) *Special rules.* In selecting children to participate in Chapter 1, an LEA may implement the following provisions:

(1) An LEA may use funds available under this part during the current school year to continue to serve educationally deprived children who begin participation in a Chapter 1 project but who, in the same school year, are transferred to a school attendance area or a school not receiving funds under this part.

(2) An LEA may skip educationally deprived children in greatest need of special assistance if those children are receiving, from non-Federal sources, services of the same nature and scope as would otherwise be provided under Chapter 1.

(3) An LEA may use funds available under this part to serve, for a maximum of two additional years, children who were identified in the previous year as being in greatest need for special assistance and who continue to be educationally deprived but are no longer in greatest need of special assistance.

(4) An LEA shall consider as eligible and may serve children who, at any time in the previous two years, received services under the Chapter 1 Program for Neglected or Delinquent Children.

(5)(i) An LEA may identify as eligible and serve under this part children receiving services to overcome handicapping conditions or limited English proficiency if these children—

(A) Have needs stemming from educational deprivation and not needs related solely to their handicapping conditions or limited English proficiency; and

(B) Are selected on the same basis as other children identified as eligible for and selected to receive services under paragraph (b) of this section.

(ii) In identifying and selecting limited English proficient children for participation in the Chapter 1 LEA Program, an LEA shall—

(A) For children with sufficient English language proficiency, use tests written in the English language, with or without bilingual assistance; or

(B) For children whose lack of English language proficiency precludes valid assessment in the English language, use factors such as teacher evaluation of student performance, language dominance tests in combination with other measures, or other indicators that may be used separately, as a composite score, or as a composite with weighting, to select children on a basis other than English language deficiency.

(iii) An LEA may not use funds available under this part to provide services that are required by Federal, State, or local law to overcome children's handicapping conditions or limited English proficiency.

(Authority: 20 U.S.C. 2724)

§ 200.32 What are the size, scope, and quality requirements of a project?

An LEA shall use funds available under this part for a project that is of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the children being served.

(Authority: 20 U.S.C. 2722(c)(1))

§ 200.33 How does an LEA allocate resources to project areas and schools?

(a) Except as provided in paragraph (b) of this section, an LEA shall allocate resources available under this part among project areas and schools on the basis of—

(1) The number and needs of children selected for participation under § 200.31;

(2) The degree of educational deprivation of these children; and

(3) The services to be provided.

(b) For the sole purpose of allocating resources available under this part among project areas and schools under paragraph (a) of this section, an LEA may continue to count, for two additional years, children in those areas and schools who—

(1) Received Chapter 1 services in the preceding school year; but

(2) Are no longer eligible for services because of improved academic achievement attributable to the Chapter 1 services.

(Authority: 20 U.S.C. 2723(c))

§ 200.34 How does an LEA involve parents?

(a) *General rule.* (1) An LEA may receive funds under this part only if it implements programs, activities, and procedures for the involvement of parents of participating public and private school children. This involvement must include, but is not limited to, parent input into the planning, design, and implementation of the Chapter 1 LEA Program.

(2)(i) The activities and procedures required under paragraph (a)(1) of this section must be planned and implemented with the meaningful consultation of parents of participating children.

(ii) The consultation required in paragraph (a)(2)(i) of this section and in other sections in this part must be organized, systematic, ongoing, informed, and timely in relation to decisions about the program.

(3) The activities and procedures for the involvement of parents must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward achieving the goals under paragraph (b) of this section.

(b) *Goals of parental involvement.* To meet the requirements in paragraph (a) of this section, an LEA shall, in coordination with parents of participating children, develop programs, activities, and procedures that have the following goals:

(1) To inform parents of participating children of the—

(i) Reasons their children are participating in the program; and

(ii) Specific instructional objectives and methods of the program.

(2) To support the efforts of parents, including training parents, to the maximum extent practicable, to—

(i) Work with their children in the home to attain the instructional objectives of the program; and

(ii) Understand the program requirements.

(3) To train parents, teachers, and principals to build a partnership between home and school.

(4) To train teachers, principals, and other staff members involved in the Chapter 1 LEA Program to work effectively with the parents of participating children.

(5) To consult with parents, on an ongoing basis, concerning the manner in which the school and parents can work better together to achieve the program's objectives.

(6) To provide a comprehensive range of opportunities for parents to become informed, in a timely way, about how the program will be designed, operated, and evaluated, allowing opportunities for parental participation, so that parents and educators can work together to achieve the program's objectives.

(7) To ensure opportunities, to the extent practicable, for the full participation of parents who lack literacy skills or whose native language is not English.

(c) *Specific requirements.* An LEA shall implement the following activities:

(1)(i) Develop written policies, after consultation with and review by parents, to ensure that parents are involved in the planning, design, and implementation of the Chapter 1 LEA Program. The written policies must provide for timely response to recommendations by parents.

(ii) Make the policies available to parents of participating children.

(2) Convene an annual meeting, to which all parents of participating children must be invited, to explain the programs and activities provided with funds available under this part. The annual meeting may be districtwide or at the building level so long as all parents of participating children are provided the opportunity to attend.

(3)(i) Provide parents of participating children with reports on their children's progress.

(ii) To the extent practical, conduct a parent-teacher conference with the parents of each participating child to discuss the child's progress, placement, and methods the parents can use to complement the child's instruction.

(iii) Make education personnel under the Chapter 1 LEA Program, including pupil services personnel, readily accessible to parents.

(iv) Permit parents of participating children to observe Chapter 1 LEA Program activities.

(4) Provide opportunities for regular meetings of parents to formulate parental input into the program, if parents of participating children so desire.

(5) Provide parents of participating children with timely information about the program.

(6) Make parents aware of parental involvement requirements and other relevant provisions of the program.

(7) Provide reasonable support for parental involvement activities as parents may request.

(8) Coordinate, to the extent possible, parental involvement activities with programs funded under the Adult Education Act.

(9) To the extent practicable, provide information, programs, and activities for parents under this section in a language and form that the parents understand.

(d) *Assessment of the parental involvement program.* An LEA shall annually assess, through consultation with parents, the effectiveness of the parental involvement program and determine what action needs to be taken, if any, to increase parental participation.

(e) *Allowable activities and costs.* Chapter 1 activities that an LEA may support with funds available under this part to meet the requirements of this section include the following:

(1) Regular parent conferences.

(2) Parent resource centers.

(3) Parent training programs, including reasonable and necessary expenditures associated with parents' attendance at training sessions.

(4) Hiring, training, and utilization of parent involvement liaison workers.

(5) Reporting to parents on children's progress.

(6) Training and support of personnel, including pupil services personnel, to work with parents, coordinate parent activities, and make home contacts.

(7) Use of parents as classroom volunteers, tutors, and aides.

(8) Provision of school-to-home complementary curriculum and materials.

(9) Provision of assistance in implementing home-based education activities that reinforce classroom instruction and student motivation.

(10) Provision of timely information on the Chapter 1 LEA Program, including program plans and evaluations.

(11) Solicitation of parents' suggestions in the planning, development, and operation of the program.

(12) Provision of timely responses to parent recommendations.

(13) Parent advisory councils.

(14) Other activities designed to enlist the support and participation of parents in the instruction of their children.

(Authority: 20 U.S.C. 2726, 2731(a)(4))

§ 200.35 What are the requirements for evaluating and reporting project results?

(a) *LEA evaluations.* (1)(i) An LEA shall evaluate, at least once every three years, the effectiveness of its Chapter 1 projects, in terms of basic and more advanced skills that all children are expected to master, on the basis of—

(A) The desired outcomes described in the LEA's application; and

(B) Except for Chapter 1 children in preschool, kindergarten, and first grade, student achievement, aggregated for the LEA as a whole, in accordance with the national standards in Subpart H.

(ii) In accordance with § 200.1(b)(1) (statement of purpose) and § 200.20(a)(10)(i)(D) (coordination with the regular program), the LEA shall include in its evaluation a review of Chapter 1 participating children's progress in the regular program of the LEA. This review may be based on teacher judgments, grades, retention rates, and other appropriate indicators of success.

(2)(i) The LEA shall determine whether improved performance of Chapter 1 participating children is sustained over a period of more than 12 months.

(ii) To make this determination, an LEA shall assess performance of the same children for at least two consecutive 12-month periods, provided these children continue to be enrolled in schools of the LEA.

EXAMPLE: An LEA provides Chapter 1 services during the 1989–90 school year. The LEA measures the gains made by participating children on a spring-spring testing cycle (spring of 1989, 1990). To determine whether improved performance is sustained over a period of more than 12 months, the LEA measures performance again in the spring of 1991.

(3) The LEA shall report its evaluation results to the SEA at least once during each three-year application cycle.

(b) *SEA evaluations.* (1) An SEA shall evaluate, at least every two years, the Chapter 1 programs in the State on the basis of the local evaluations conducted under paragraph (a) of this section and sections 1107, 1202(a)(6), and 1242(d) of the Act.

(2) The SEA shall inform its LEAs, in advance, of the specific data that will be needed and how the data may be collected.

(3) The SEA shall—

(i) By a date established by the Secretary, submit its evaluation to the Secretary; and

(ii) Make public the results of the evaluation.

(c) *Annual performance report.* (1) An SEA shall annually—

(i) Collect data specified in section 1019 of the Act and by the Secretary in the SEA's annual performance report; and

(ii) Submit those data to the Secretary.

(2) An LEA shall provide to the SEA any data needed by the SEA to complete its annual performance report.

(Approved by the Office of Management and Budget under control number 1810-0037)

(Authority: 20 U.S.C. 1221e-1a, 2701(b), 2722 (b), (c)(3), 2729, 2835, 2852)

[54 FR 21756, May 19, 1989;54 FR 27793, June 30, 1989, as amended at 54 FR 30737, July 24, 1989]

§200.36 What are the requirements for schoolwide projects?

(a) *Eligibility for a schoolwide project.* An LEA may conduct a Chapter 1 project to upgrade the entire educational program in a school if the following requirements are met:

(1) The school serves an eligible attendance area or is an eligible school in accordance with § 200.30.

(2) For the first year of the three-year project period the LEA determines, using the same measure of low income used to identify and rank school attendance areas under § 200.30(c), that at least 75 percent of the children residing in the school attendance area or enrolled in the school are from low-income families.

(3) The LEA develops a plan for the school that—

(i) Meets the requirements in paragraph (b) of this section; and

(ii) Has been approved by the SEA.

(4) The LEA meets the fiscal requirements in paragraph (c) of this section.

(b) *Required plan.* The plan required under paragraph (a)(3) of this section must—

(1) Provide for a comprehensive assessment of the educational needs of all students in the school, particularly the special needs of educationally deprived children;

(2) Establish goals to—

(i) Meet the special needs of all students; and

(ii) Ensure that educationally deprived children are—

(A) Served effectively; and

(B) Demonstrate performance gains that are comparable to the performance gains of other students;

(3) Describe the instructional program, pupil services, and procedures to be used to implement the goals of the schoolwide project;

(4) Describe the specific uses of funds available under this part in the schoolwide project;

(5) If appropriate, describe how the school will move to implement an effective schools program as defined in section 1471 of the Act;

(6) Be developed with the involvement of individuals who will be engaged in carrying out the plan, including—

(i) Parents;

(ii) Teachers;

(iii) Librarians;

(iv) Education aides;

(v) Pupil services personnel;

(vi) Administrators; and

(vii) If the plan relates to a secondary school, students;

(7) Provide for consultation among the individuals listed in paragraph (b)(6) of this section concerning the—

(i) Educational progress of all students in the school; and

(ii) Development and implementation of the accountability measures required in paragraph (f) of this section;

(8) Provide for appropriate training of parents of children to be served, teachers, librarians, and other instructional, administrative, and pupil services personnel to enable these individuals to carry out the plan; and

(9) Include procedures for measuring progress under paragraph (f) of this section and a description of the measures to be used.

(c) *Fiscal requirements.* An LEA that uses funds available under this part to conduct a schoolwide project shall meet the following fiscal requirements:

(1)(i) In an LEA with one or more schoolwide projects and one or more other schools serving project areas, the LEA shall provide for each schoolwide project an amount of funds made available under this part that, for each educationally deprived child, equals or exceeds the amount of funds made available under this part that the LEA provides for each educationally deprived child served in other project schools. In determining the number of educationally deprived children in a schoolwide project, the LEA shall use either of the following:

(A) The number of children in the schoolwide project below the highest ranked child served in other project schools in the LEA.

(B) All children meeting the definition of "educationally deprived children" in § 200.6(c).

(ii) The LEA shall allocate to a schoolwide project an amount of funds made available under this part that is sufficient to ensure that the project is of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the educationally deprived children served.

(2)(i) Except as provided in paragraph (c)(2)(ii) of this section, during each fiscal year in which a schoolwide project is carried out, the LEA shall, in each schoolwide project, spend per child an amount of State and local funds—excluding amounts spent under a compensatory program as defined in § 200.45(a)(1) and special supplementary State and local funds required under Chapter 1 of the ECIA for each child in a schoolwide project who was not educationally deprived—that is at least equal to the amount of State and local funds the LEA spent per child in that school during the preceding fiscal year.

(ii) The LEA shall include for each fiscal year the cost of services for State and local programs under § 200.45(a)(2) only in proportion to the number of children served by these programs in the school in the year for which the determinations are made.

(3) The LEA shall ensure that funds made available under this part for a schoolwide project only supplement, and to the extent practical, increase the level of funds that would, in the absence of funds under this part, be made available from non-Federal sources for the school.

(4) The LEA shall comply with the comparability requirements in § 200.43.

(5) Notwithstanding paragraph (d)(2) of this section, the LEA shall keep records to document the expenditure of funds made available under this part in a schoolwide project.

(d) *Effect of selection for a schoolwide project.* (1) The SEA shall approve the plan of the LEA for a schoolwide project for a period of three years if the plan meets the requirements in paragraphs (b) and (c) of this section.

(2) For each school that has a schoolwide project plan approved by the SEA, the LEA is not required to–

(i) Comply with any Chapter 1 requirements prohibiting the commingling of funds available under this part with funds available for regular programs in order to show that Chapter 1 funds benefit only educationally deprived children;

(ii) Identify particular children as eligible to participate in the schoolwide project, but shall identify educationally deprived children for the purpose of paragraphs (b), (c), and (f) of this section; and

(iii) Demonstrate that the particular services paid for with Chapter 1 funds supplement the services regularly provided in that school.

(e) *Use of funds.* In addition to the activities included in § 200.4, the LEA may use funds made available under this part in schoolwide projects for–

(1) Planning and implementing effective schools programs; and

(2) Other activities to improve the instructional program and pupil services in the school such as—

(i) Reducing class size;

(ii) Training staff and parents; and

(iii) Implementing extended-day programs.

(f) *Accountability requirements.* (1) Except as provided in paragraph (f)(2) of this section, in order to continue a schoolwide project, an LEA must be able to demonstrate after three years for each school participating in a schoolwide project that—

(i) The achievement gains of educationally deprived children in the school exceed the average achievement gains of comparable participating Chapter 1 children in the LEA as a whole; or

(ii) The achievement gains of educationally deprived children in the school exceed the average achievement gains of comparable educationally deprived children in that school in the three fiscal years prior to the start of the schoolwide project.

(2) For a secondary school, if achievement levels over the three-year schoolwide project period as compared with the three-year period immediately preceding the schoolwide project do not decline, demonstration of lower dropout rates, increased retention rates, or increased graduation rates are acceptable in lieu of increased achievement.

(3) If the SEA determines that a schoolwide project meets the requirements in paragraph (f) (1) or (2) of this section at the end of the three-year period provided in paragraph (d)(1) of this section, the SEA shall allow the LEA to continue the schoolwide project for an additional three years.

(4)(i) For the purpose of paragraph (f) (1) and (2) of this section, the LEA shall annually collect achievement and other assessment data for each school participating in a schoolwide project.

(ii) The LEA shall make the results of the annual collection of achievement and other assessment data available to parents, the public, and the SEA.

(5) The program improvement requirements in §§ 200.37–200.38 apply to schoolwide projects under this section.

(g) *Participation of children enrolled in private schools.* In determining which private school children residing in the school attendance area of a school participating in a schoolwide project are eligible for Chapter 1 services, the LEA shall apply which ever method it selected under paragraph (c)(1)(i) (A) or (B) of this section.

(Approved by the Office of Management and Budget under control number 1810-0504)

(Authority: 20 U.S.C. 2725, 2728(c), 2730-2731)

[54 FR 21756, May 19. 1989, as amended at 54 FR 30737, July 24, 1989]

§ 200.37 What are an SEA's responsibilities for program improvement?

(a) *SEA program improvement plan.* (1) An SEA shall develop, in consultation with the committee of practitioners under § 200.70(e), a plan to ensure implementation of the provisions of paragraph (b) of this section and § 200.38.

(2) The SEA's plan must contain, but is not limited to, the following:

(i) The objective measures and standards the SEA and LEAs will use to assess aggregate performance and substantial progress toward meeting desired outcomes. The SEA may establish standards to be included in the plan to improve the educational opportunities of educationally deprived children by helping those children succeed in the regular program, attain grade-level proficiency, and improve achievement in basic and more advanced skills.

(ii) The means the SEA will use to develop a joint plan with an LEA that has identified, under § 200.38(b), a school in need of program improvement to attain satisfactory student progress.

(iii) In accordance with § 200.38(b)(6), the timetable for developing and implementing a joint plan with an LEA.

(iv) The program improvement assistance to be provided to a school identified under § 200.38(b)(6), which may include, but is not limited to—

(A) Training and retraining personnel;

(B) Developing curricula that have shown promise in similar schools;

(C) Replicating promising practices in effective schools models;

(D) Improving coordination between programs assisted under Chapter 1 and the regular school program; and

(E) Developing innovative strategies to enhance parental involvement.

(3) The SEA shall—

(i) Disseminate its plan to all LEAs and other State agencies that receive funds under Chapter 1; and

(ii) Make the plan available at the SEA for inspection by the Secretary.

(4) The SEA may amend its plan, if necessary, after consultation with the committee of practitioners.

(b) *SEA assistance to LEAs.* (1)(i) If funds are appropriated for the implementation of school improvement programs under section 1405 of the Act, an SEA shall fully implement the program improvement activities described in this section and § 200.38.

(ii) If funds are not appropriated under section 1405 of the Act, the SEA shall at a minimum—

(A) With the least possible paperwork and burden, follow the progress of any school identified by an LEA under § 200.38(b)(1);

(B) Develop and implement with LEAs joint plans for program improvement under § 200.38(b)(6);

(C) Ensure that program improvement assistance is provided to each school identified under § 200.38(b)(6); and

(D) Conduct other program improvement activities to the extent practicable.

(2) An LEA may apply to the SEA for program improvement assistance funds appropriated under section 1405 of the Act.

(Approved by the Office of Management and Budget under control number 1810-0504)

(Authority: 20 U.S.C. 2730, 2731 (c)-(d), (g)-(i), 2825, 2851(b)).

[54 FR 21756, May 19, 1989; 54 FR 27793, June 30, 1989, as amended at 54 FR 30737, July 24, 1989]

§ 200.38 What are an LEA's responsibilities for program improvevement?

(a) *Local review.* For each project school, an LEA shall—

(1)(i) Conduct an annual review of the effectiveness of its Chapter 1 project in improving student performance as measured by aggregate performance and the desired outcomes described in the LEA's application; and

(ii) Make the results of the review available to teachers, parents of participating children, and other appropriate parties, including principals of schools attended by Chapter 1 children;

(2) Determine whether improved performance is sustained over a period of more than 12 months as required by § 200.38(b)(6)(iv)(C); and

(3) Use the results of the review and the LEA's evaluation under section 1019 of the Act in program improvement efforts required by paragraph (b) of this section.

(b) *School program improvement.* (1) Except as provided in paragraph (b)(4) of this section, an LEA shall implement the requirements in paragraph (b)(2) of this section with respect to each school that—

(i) Does not show substantial progress toward meeting the desired outcomes described in the LEA's application; or

(ii)(A) Shows no improvement or a decline in aggregate performance of participating children for a 12-month period. No improvement or a decline in aggregate performance occurs if participating children, in the aggregate, in the school fail to make gains beyond that which they would be expected to make in the absence of the additional help the program provided.

(B)(*1*) Unless the conditions in paragraph (b)(1)(ii)(B)(*2*) of this section exist, the LEA is only required to determine the aggregate performance of a school in the instructional area that is the primary focus of the Chapter 1 LEA Program in that school.

(*2*) If the Chapter 1 LEA Program in that school addresses two or more instructional areas with relatively equal emphasis, the LEA shall determine aggregate performance in each area.

(2) For each school identified under paragraph (b)(1) of this section, the LEA shall develop and implement, in coordination with the school, a plan for program improvement that—

(i) Describes how the LEA will identify and modify Chapter 1 programs for each school and its participating children under this section;

(ii) Incorporates those program changes that have the greatest likelihood of improving the performance of educationally deprived children, including—

(A) A description of educational strategies designed to achieve the LEA's desired outcomes or otherwise to improve the performance and meet the needs of participating children;

(B) A description of the resources, and how those resources will be applied, to carry out the strategies selected, including, as appropriate—

(*1*) Qualified personnel;

(*2*) Inservice training;

(*3*) Curriculum materials;

(*4*) Equipment;

(*5*) Physical facilities;

(*6*) Technical assistance;

(7) Alternative curriculum that has shown promise in similar schools;

(8) Improving coordination between the Chapter 1 LEA Program and the regular school program;

(9) Evaluation of parental involvement;

(10) Appropriate inservice training for Chapter 1 staff and other staff who teach participating children; and

(11) Other measures selected by the LEA.

(3) The LEA shall—

(i) Submit the plan to the local school board and the SEA; and

(ii) Make the plan available to parents of participating children in the school.

(4) The LEA is not required to—

(i) Develop a school improvement plan for a school that served 10 or fewer children for the entire school year; or

(ii) Complete and implement a school improvement plan under development if data become available during plan development or prior to plan implementation that demonstrate that there has been a gain in aggregate performance and that substantial progress has been made toward meeting the desired outcomes.

(5)(i) The LEA shall develop a timeline for implementation of each school's plan, taking into consideration the degree of change needed, the nature of the changes, and other relevant factors.

(ii)(A) The plan must be fully implemented as soon as possible but no later than the beginning of the second school year after the school year during which the school did not show substantial progress toward meeting the LEA's desired outcomes or showed no improvement or a decline in aggregate performance of participating children.

(B) If full implementation of the plan requires the maximum time allowed under paragraph (b)(5)(ii)(A) of this section, the LEA shall implement portions of the plan as soon as possible

EXAMPLE: An LEA determines that a school, during the 1988-89 school year, has shown a decline in aggregate performance. The LEA must develop and fully implement a school improvement plan in that school as soon as possible but not later than September 1990. For example, if the necessary changes can be accomplished quickly, such as purchasing readily available materials or equipment, the LEA would be able to implement its plan by September 1989. On the other hand, if the needed changes require a complete redesign of the LEA's project, the LEA might not be able to implement the plan fully before September 1990. In this case, the LEA must implement portions of the plan as soon as possible. For example, the LEA develops and implements a staff training program during the 1989-90 school year in preparation for full implementation of the plan in September 1990.

(6)(i) If, after the LEA's plan has been in effect for one full school year, the school is still identified as needing improvement under paragraph (b)(1) of this section, the LEA shall, with the SEA, develop and implement a joint plan for program improvement in the school.

(ii) The joint plan must—

(A) Be developed and implemented in consultation with school staff and parents of participating children; and

(B) Be approved by both the SEA and LEA before the plan may be implemented.

(iii)(A) The joint plan must be fully implemented as soon as possible but no later than the beginning of the second school year after the full school year during which the LEA's plan under paragraph (b)(2)-(5) of this section was in effect.

(B) If full implementation of the joint plan requires the maximum time allowed under paragraph (b)(6)(iii)(A) of this section, the SEA and LEA shall implement portions of the plan as soon as possible.

(iv) If the SEA finds that, after the joint plan has been in effect for one full school year, a school continues to need improvement under paragraph (b)(1) of this section, the SEA, with the LEA, shall—

(A) Review the plan;

(B) Make revisions that are designed to improve performance; and

(C) Continue to review and revise the joint plan each consecutive year until improved performance is sustained over a period of more than 12 months.

(v) Nothing in this section or § 200.37 shall be construed to give the SEA any authority concerning the educational program of an LEA that does not otherwise exist under State law.

Example: Both the LEA and SEA should follow the progress of the LEA's school improvement plan during the first full school year of implementation. In the example following paragraph (b)(5) of this section, if a plan is implemented by September 1989, school year 1989-90 would be the first full school year. If after one full year of implementation (school year 1989-90), the LEA determines that the school still has not improved, the LEA must develop and fully implement a joint program improvement plan with the SEA before the beginning of the second school year following the full school year the LEA's plan was in effect. Thus, in this example, the joint plan would have to be developed and fully implemented by the beginning of the 1991-92 school year. If the maximum time is needed, portions of the joint plan must be implemented as soon as possible. For example, if full implementation cannot be accomplished until the beginning of the 1991-92 school year, the LEA might be required to implement a staff training program during the 1990-91 school year in preparation for full implementation of the joint plan in school year 1991-92.

For an LEA that is unable to implement fully the school improvement plan until September 1990, school year 1990-91 would be the first full school year. If after one full year of implementation (school year 1990-91), the LEA determines that the school still has not improved, the LEA must develop and fully implement a joint program improvement plan with the SEA before the beginning of the second school year following the full school year the LEA's plan was in effect. Thus in this example, the joint plan would have to be developed and fully implemented by the beginning of the 1992-93 school year. If the maximum time is needed, portions of the joint plan must be implemented as soon as possible. For example, if full implementation cannot be accomplished unitl the beginning of the 1992-93 school year, the LEA might be required to implement a staff training program during the 1991-92 school year in preparation for full implementation of the joint plan in school year 1992-93.

(c) *Local conditions.* (1) The LEA and the SEA, in performing their responsibilities under this section, shall take into consideration—

(i) The mobility of the student population;

(ii) The extent of educational deprivation among participating children that may negatively affect improvement efforts;

(iii) The difficulties involved in dealing with older children in Chapter 1 programs in secondary schools;

(iv) Whether indicators other than improved achievement demonstrate the positive effects on participating children of Chapter 1 activities; and

(v) Whether a change in the review cycle under section 1019 of the Act or paragraph (a)(1) of this section or in the measurement instrument used or other measure-related phenomena has rendered results invalid or unreliable for a particular year.

(2) The local conditions in paragraph (c)(1) of this section may be considered, as appropriate, at any point in the program improvement process, including the following:

(i) Determining the extent of services needed to meet desired outcomes in the LEA's application.

(ii) Allocating resources to schools.

(iii) Determining how substantial progress toward meeting desired outcomes will be measured.

(iv) Identifying a school in need of program improvement under paragraph (b)(1) of this section.

(v) Identifying a school that continues to need program improvement under paragraph (b)(6) of this section.

(d) *Student program improvement.* On the basis of the evaluation under section 1019 of the Act and local reviews under paragraph (a) of this section, an LEA shall—

(1) Identify all students who have been served for a school year and—

(i) Have not shown substantial progress toward meeting the desired outcomes established for participating children under § 200.20(a)(4); or

(ii) Whose performance shows no improvement or a decline;

(2) Consider modifications in the LEA's Chapter 1 project to serve those students better;

(3) Conduct a thorough assessment of the educational needs of children who remain in the LEA's Chapter 1 project after two consecutive years of participation and—

(i) Have not shown substantial progress toward meeting the desired outcomes established for participating children under § 200.20(a)(4); or

(ii) Whose performance shows no improvement or a decline; and

(4) If appropriate, use the results of that needs assessment to modify the Chapter 1 project to meet the children's needs.

(e) *Private school children.* Program improvement and student improvement activities under this section must include participating children in private schools in accordance with section 1017 of the Act.

(f) *Effective date.* An LEA shall begin identifying schools and students in need of program improvement based on information gathered before or during the 1988–89 school year.

(g) *Technical assistance centers.* In carrying out the program improvement and student improvement activities under this section, an LEA and SEA shall utilize the resources of the regional technical assistance centers and appropriate regional rural assistance programs established under section 1456 of the Act to the full extent those resources are available.

(Approved by the Office of Management and Budget under control number 1810-0037)

(Authority: 20 U.S.C. 2731)

[54 FR 21756, May 19, 1989; 54 FR 27793, June 30, 1989, as amended at 54 FR 30737, July 24, 1989]

§ 200.39 How may personnel be assigned non-Chapter 1 duties?

(a) An LEA may assign public school personnel paid entirely with funds available under this part to limited supervisory duties that may provide some benefit to children not participating in the Chapter 1 project if—

(1) Similarly situated personnel at the same school site, who are not paid with funds available under this part, are assigned these duties; and

(2) The time spent by Chapter 1 personnel on these duties does not exceed the least of the following:

(i) The proportion of total work time that similarly situated non-Chapter 1 personnel at the same school site spend performing these duties.

(ii) One period per day.

(iii) Sixty minutes per day.

(b) The amount of time referred to in paragraph (a)(2) of this section may be calculated on a daily, weekly, monthly, or annual basis.

(c) The duties in paragraph (a) of this section need not be limited to classroom instruction and may include, but are not limited to, the following:

(1) Supervision of halls, playgrounds, lunchrooms, study halls, bus loading and unloading, and homerooms.

(2) Participation as a member of a school or district curriculum committee.

(3) Participation in the selection of regular curriculum materials and supplies.

(Authority: 20 U.S.C. 2853(a))

[54 FR 21756, May 19, 1989; 54 FR 27793, June 30, 1989]

Subpart E—What Fiscal Requirements Apply to the Chapter 1 LEA Program?

§ 200.40 What is the prohibition against using funds under this part to provide general aid?

An LEA may use funds available under this part only for projects that are designed and implemented to meet the special educational needs of educationally deprived children who are—

(a) Identified and selected in accordance with § 200.31; and

(b) Included in the LEA's application that has been approved by the SEA.

(Authority: 20 U.S.C. 2721(a), 2722(b), 2724)

§ 200.41 What maintenance of effort requirements apply to this program?

(a) (1) *Basic standard.* Except as provided in § 200.42, an LEA may receive its full allocation of funds under this part if the SEA finds that either the combined fiscal effort per student or the aggregate expenditures of State and local funds with respect to the provision of free public education in the LEA for the preceding fiscal year was not less than 90 percent of the combined fiscal effort per student or the aggregate expenditures for the second preceding fiscal year.

(2) *Meaning of "preceding fiscal year."* For purposes of determining maintenance of effort, the "preceding fiscal year" is the Federal fiscal year

or the 12-month fiscal period most commonly used in a State for official reporting purposes prior to the beginning of the Federal fiscal year in which funds are available.

Example: For funds first made available on July 1, 1989, if a State is using the Federal fiscal year, the "preceding fiscal year" is Federal fiscal year 1988 (which began on October 1, 1987) and the "second preceding fiscal year" is Federal fiscal year 1987 (which began on October 1, 1986). If a State is using a fiscal year that begins on July 1, 1989, the "preceding fiscal year" is the 12-month period ending on June 30, 1988 and the "second preceding fiscal year" is the period ending on June 30, 1987.

(3) *Expenditures*—(i) *To be considered.* In determining an LEA's compliance with the maintenance of effort requirement, the SEA shall consider the LEA's expenditures from State and local funds for free public education. These include expenditures for administration, instruction, attendance, health services, pupil transportation, plant operation and maintenance, fixed charges, and net expenditures to cover deficits for food services and student body activities.

(ii) *Not to be considered.* The SEA shall not consider the following expenditures in determining an LEA's compliance with the maintenance of effort requirement:

(A) Any expenditures for community services, capital outlay, or debt service.

(B) Any expenditures made from funds provided under Chapter 1 and Chapter 2 of Title I of the Act or Chapter 1 and Chapter 2 of the ECIA.

(b) *Failure to maintain effort.* (1) If an LEA fails to maintain effort and a waiver under § 200.42 is not granted, the SEA shall reduce the LEA's allocation of funds under this part in the exact proportion by which the LEA fails to meet 90 percent of both the combined fiscal effort per student and aggregate expenditures (using the measure most favorable to the LEA) for the second preceding fiscal year.

(2) In detemining maintenance of effort for the fiscal year immediately following the fiscal year in which the LEA failed to maintain effort, the SEA shall consider the LEA's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the LEA) for the third preceding fiscal year.

Example: In Federal fiscal year 1990, an LEA fails to maintain effort because its fiscal effort in the preceding fiscal year (1988) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987). In assessing whether the LEA maintained effort during the next fiscal year (1991), the SEA may consider the LEA's expenditures for the second preceding fiscal year (1988) (the year that caused the LEA's failure to maintain effort) to be no less than 90 percent of the LEA's expenditures in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728(a)(1), (2))

[54 FR 21756, May 19. 1989; 54 FR 27793, June 30, 1989]

§ 200.42 Under what circumstances may an SEA waive the maintenance of effort requirement?

(a)(1) An SEA may waive, for one fiscal year only, the maintenance of effort requirement in § 200.41 if the SEA determines that a waiver would be equitable due to exceptional or uncontrollable circumstances. These circumstances include but are not limited to the following:

(i) A natural disaster.

(ii) A preciptious and unforeseen decline in the financial resources of the LEA.

(2) An SEA may not consider tax initiatives or referenda to be exceptional or uncontrollable circumstances.

(b)(1) If the SEA grants a waiver under paragraph (a) of this section, the SEA shall not reduce the amount of funds available under this part the LEA is otherwise entitled to receive.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year for which the waiver was granted, the SEA shall consider the LEA's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the LEA) for the third preceding fiscal year.

Example: In Federal fiscal year 1990, an LEA secures a waiver because its fiscal effort in the preceding year (1988) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987) due to exceptional or uncontrollable circumstances. In assessing whether the LEA maintained effort during the next fiscal year (1991), the SEA may consider the LEA's expenditures for the second preceding fiscal year (1988) (the year for which the LEA needed a waiver) to be no less than 90 percent of the LEA's expenditures in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728(a)(3))

[54 FR 21756, May 19. 1989; 54 FR 27793, June 30, 1989]

§ 200.43 What comparability of services requirements apply to this program?

(a) Except as provided in paragraph (b) of this section and § 200.45, an LEA may receive funds under this part only if, on a districtwide or grade span basis,—

(1) The LEA uses State and local funds to provide services in project areas that, taken as a whole, are at least comparable to services being provided in school attendance areas that are not receiving funds under this part; or

(2) In the event the LEA selects all its school attendance areas as project areas, the LEA uses State and local funds to provide services that, taken as a whole, are substantially comparable in each project area.

(b) An LEA with not more than one school attendance area for each grade span is not required to meet the comparability requirements in paragraph (a) of this section.

(c)(1) An LEA shall be considered to have met the comparability requirements in paragraph (a) of this section if it either—

(i) Files with the SEA a written assurance that it has established and implemented—

(A) A districtwide salary schedule;

(B) A policy to ensure equivalence among schools in teachers, administrators, and auxiliary personnel; and

(C) A policy to ensure equivalence among schools in the provision of curriculum materials and instructional supplies; or

(ii) Establishes and implements other measures for determining compliance such as the following:

(A) Compares the average number of students per instructional staff in each project school with the average number of students per instructional staff in schools not participating in programs under this part. A project school is comparable if its average does not exceed 110 percent of the average of schools not participating in programs under this part.

(B) Compares the average instructional staff salary expenditure per student in each project school with the average instructional staff salary expenditure per student in schools not participating in programs under this part. A project school is comparable if its average is at least 90 percent of the average of schools not participating in programs under this part.

(2) In determining compliance with paragraph (a) of this section, an LEA does not need to consider unpredictable changes in student enrollment or personnel assignments that occur after the beginning of a school year.

(d)(1) An LEA shall develop written procedures to ensure compliance with paragraph (a) of this section.

(2) The written procedures must include a process for demonstrating that State and local funds are used to provide services in project areas that are at least comparable to the services provided with State and local funds in school attendance areas that are not receiving services with funds under this part.

(e) An LEA shall maintain annual records documenting compliance with paragraph (a) of this section.

(f)(1) The SEA shall monitor each LEA's compliance with the comparability requirements.

(2) If an LEA is found not to be in compliance with the comparability requirements, the amount to be withheld or repaid is the amount or percentage by which the LEA failed to comply with the measures established under paragraph (c) of this section.

(Approved by the Office of Management and Budget under control number 1810-0504)

(Authority: 20 U.S.C. 2728(c), (d))

[54 FR 21756, May 19. 1989; 54 FR 27793, June 30, 1989, as amended at 54 FR 30737, July 24, 1989]

§ 200.44 What supplement, not supplant requirement applies to this program?

(a) Except as provided in § 200.45(a)(1), an LEA may use funds available under this part only to supplement and, to the extent practicable, increase the level of non-Federal funds that would, in the absence of funds under this part, be made available for the education of pupils participating in Chapter 1 projects, and in no case may funds available under this part be used to supplant those non-Federal funds.

(b) To meet the requirement in paragraph (a) of this section, an LEA is not required to provide services under this part through use of a particular instructional method or in a particular instructional setting.

(Authority: 20 U.S.C. 2728(b), (d))

[54 FR 21756, May 19, 1989; 54 FR 27793, June 30, 1989]

§ 200.45 How may an LEA exclude special State and local funds from comparability and supplement, not supplant determinations?

(a) *General rule.* (1) For the purpose of determining compliance with the comparability requirements in § 200.43 and the supplement, not supplant requirement in § 200.44, an LEA may exclude State and local funds spent in carrying out the following types of programs:

(i) Special State programs designed to meet the educational needs of educationally deprived children, including compensatory education for educationally deprived children, that the Secretary has determined in advance under paragraph (b) of this section meet the requirements in section 1018 (d)(1)(B) of the Act.

(ii) Special local programs designed to meet the educational needs of educationally deprived children, including compensatory education for educationally deprived children, that the SEA has determined in advance under paragraph (c) of this section meet the requirements in section 1018(d)(1)(B) of the Act.

(2) For the puspose of determining compliance with the comparability requirements in § 200.43 only, an LEA may also exclude State and local funds spent in carrying out the following types of programs:

(i) Bilingual education for children of limited English proficiency.

(ii) Special education for handicapped children.

(iii) State phase-in programs that the Secretary has determined in advance under paragraph (b) of this section meet the requirements in section 1018(d)(2)(B) of the Act.

(b) *Secretarial determination regarding State programs.* (1) In order for an LEA to exclude State and local funds spent on State programs under paragraphs (a)(1)(i) and (2)(iii) of this section, an SEA shall request the Secretary to make an advance determination of whether—

(i) A special State program under paragraph (a)(1)(i) of this section meets the requirements in section 1018(d)(1)(B) of the Act; or

(ii) A state phase-in program under paragraph (a)(2)(iii) of this section meets the requirements in section 1018(d)(2)(B) of the Act.

(2) Before making a determination, the Secretary requires the SEA to submit copies of the State law and implementing rules, regulations, orders, guidelines, and interpretations that the Secretary may need to make the determination.

(3) The Secretary makes the determination in writing and includes the reasons for the determination.

(4) If there is any material change in the pertinent State law affecting the program, the SEA shall submit those changes to the Secretary.

(c) *SEA determination regarding local programs.* (1) In order for an LEA to exclude State and local funds spent on a special local program under paragraph (a)(1)(ii) of this section, the LEA shall request the SEA to make an advance determination of whether that program meets the requirements in section 1018(d)(1)(B) of the Act.

(2) Before making a determination, the SEA shall require the LEA to submit copies of the local law and implementing rules, regulations, guidelines, and interpretations that the SEA may need to make the determination.

(3) The SEA shall make the determination in writing and include the reasons for its determination.

(4) If there is any material change in the pertinent local requirements affecting the program, the LEA shall submit those changes to the SEA.

(Authority: 20 U.S.C. 2728 (b), (c), (d))

[54 FR 21756, May 19, 1989; 54 FR 27793, June 30, 1989]

§ 200.46 What is the maximum amount of funds an LEA may carry over?

(a) *Limitation on carryover.* The amount of funds allocated to an LEA under §§ 200.22-200.25 that remains available for obligation for one additional year under section 412(b) of GEPA is limited to—

(1) No more than 25 percent of the funds allocated to the LEA from the Federal fiscal year 1989 appropriation (allocated to the LEA for the period July 1, 1989-September 30, 1990); and

(2) No more than 15 percent of the funds allocated to the LEA from the Federal fiscal year 1990 appropriation (allocated to the LEA for the period July 1, 1990-September 30, 1991) and each subsequent year's appropriation.

(b) *Exceptions.* (1) The percentage limitations in paragraph (a) of this section do not apply to an LEA that receives less than $50,000 under §§ 200.22-200.25 for any fiscal year.

(2) An SEA may grant an LEA a waiver of the percentage limitations in paragraph (a) of this section if—

(i) The SEA determines, on a one-time basis, that the LEA's request for the waiver is reasonable and necessary; or

(ii) A supplemental Chapter 1 appropriation becomes available for obligation in any fiscal year.

(Authority: 20 U.S.C. 2832(b), 1225(b))

§ 200.47 What is the prohibition against considering payments under this part in determining State aid?

A State may not take into consideration payments under this part in determining—

(a) The eligibility of an LEA for State aid; or

(b) The amount of State aid to be paid to an LEA for free public education.

(Authority: 20 U.S.C. 2854)

§§ 200.48—200.49 [Reserved]

Subpart F—What Requirements Govern Participation in the Chapter 1 LEA Program of Educationally Deprived Children in Private Schools?

GENERAL

§ 200.50 What are an LEA's responsibilities for providing Chapter 1 services to children in private schools?

(a) (1) An LEA shall provide to educationally deprived children, who reside in a project area of the LEA and who are enrolled in private elementary and secondary schools, special educational services and arrangements as will ensure those children's participation on an equitable basis in accordance with the requirements in §§ 200.50 through 200.55 and section 1017 of the Act.

(2) The LEA shall provide the opportunity to participate in a manner that is consistent with the number and special educational needs of the educationally deprived children in private schools.

(3) The LEA shall exercise administrative direction and control over funds and property made available under this part that benefit educationally deprived children in private schools.

(4) (i) Services to children enrolled in private schools must be provided by employees of a public agency or through contract by the public agency with a person, an association, agency, or corporation who or which, in the provision of those services, is independent of the private school and of any religious organization.

(ii) This employment or contract must be under the control and supervision of the public agency.

(b) (1) If an LEA allegedly fails to provide for the equitable participation of children in private schools, a parent, teacher, or other concerned individual or organization may file a complaint with the Secretary.

(2) For the purpose of this section, a complaint is a signed, written state-

ment, including documentary evidence, alleging that an LEA has failed to meet its obligation under section 1017(a) of the Act to provide equitable services to children enrolled in private schools.

(3) The Secretary investigates a complaint and issues a letter of finding within 120 days after receipt of the complaint.

(Authority: 20 U.S.C. 2727 (a), (b))

§ 200.51 What are the requirements for consultation with private school officials?

(a) An LEA shall consult with appropriate private school officials—

(1) During all phases of the design and development of the LEA's Chapter 1 project, including consideration of—

(i) Which children will receive services;

(ii) How the children's needs will be identified;

(iii) What services will be offered;

(iv) How and where the services will be provided; and

(v) How the project will be evaluated; and

(2) Before the LEA makes any decision that affects the opportunities of eligible private school children to participate in the LEA's Chapter 1 project.

(b) The LEA shall give private school officials a genuine opportunity to express their views regarding each matter subject to the consultation requirement in paragraph (a) of this section.

(Authority: 20 U.S.C. 2727(a))

§ 200.52 What factors does an LEA use in determining equitable participation?

(a) *Equal expenditures.* (1) Expenditures of funds made available under this part for educational services and arrangements for educationally deprived children in private schools must be equal (taking into account the number of children to be served and the special education needs of such children) to expenditures of funds made available under this part for children enrolled in the public schools of the LEA.

(2) Before determining equal expenditures under paragraph (a)(1) of this section, an LEA shall pay for reasonable and necessary administrative costs of providing services to public and private school children, including special capital expenses defined in § 200.57(a)(2), from the LEA's whole allocation of funds under this part.

(b) *Services on an equitable basis.* (1) The Chapter 1 services that an LEA provides for educationally deprived children in private schools must be equitable (in relation to the services provided to public school children) and must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the private school children to be served.

(2) Services are equitable if the LEA—

(i) Assesses, addresses, and evaluates the specific needs and educational progress of eligible private school children on the same basis as public school children;

(ii) Provides, in the aggregate, approximately the same amount of instructional time and materials for each private school child as it provides for each public school child;

(iii) Expends equal amounts on services for public and private school children in accordance with paragraph (a) of this section; and

(iv) Provides private school children with an opportunity to participate that is equitable to the opportunity provided to public school children.

(Authority: 20 U.S.C. 2727(a))

§ 200.53 What are the requirements to ensure that funds do not benefit a private school?

(a) An LEA shall use funds under this part to provide services that supplement, and in no case supplant, the level of services that would, in the absence of Chapter 1 services, be available to participating children in private schools.

(b) An LEA shall use funds under this part to meet the special educational needs of participating children in a private school, but not for—

(1) The needs of the private school; or

(2) The general needs of children in the private school.

(Authority: 20 U.S.C. 2727(a), 2728(b))

§ 200.54 What are the requirements concerning equipment and supplies for the benefit of private school children?

(a) To meet the requirements of section 1017 of the Act, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the LEA acquires with funds under this part for the benefit of educationally deprived children in private schools.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the program.

(c) The public agency shall ensure that the equipment or supplies placed in a private school—

(1) Are used only for Chapter 1 purposes; and

(2) Can be removed from the private school without remodeling the private school facility.

(d) The public agency shall remove equipment or supplies from a private school if—

(1) The equipment or supplies are no longer needed for Chapter 1 purposes; or

(2) Removal is necessary to avoid unauthorized use of the equipment or supplies for other than Chapter 1 purposes.

(e) For the purpose of this section, the term "public agency" includes the LEA.

(Authority: 20 U.S.C. 2727(a))

§ 200.55 May funds be used for construction of private school facilities?

No funds under this part may be used for repairs, minor remodeling, or construction of private school facilities.

(Authority: 20 U.S.C. 2727(a))

CAPITAL EXPENSES

§ 200.56 How does a State receive a payment for capital expenses?

(a) From the amount appropriated for capital expenses under section 1017(d) of the Act, the Secretary pays a State an amount that bears the same ratio to the amount appropriated as the number of private school children in the State who were served under Chapter 1 of the ECIA during the period July 1, 1984 through June 30, 1985 bears to the total number of private school children served during that period in all States.

(b) The Secretary reallocates funds not used by a State for purposes of § 200.57 among other States on the basis of need.

(Authority: 20 U.S.C. 2727(d))

§ 200.57 How does an LEA receive a payment for capital expenses?

(a) (1) An LEA may apply to the SEA for a payment to cover capital expenses that the LEA, in providing equitable Chapter 1 services to eligible children in private schools—

(i) Has paid from funds provided under Chapter 1 of the ECIA since July 1, 1985;

(ii) Is currently paying from funds provided under this part; or

(iii) Would incur because of an expected increase in the number or percentage of private school children to be served.

(2) "Capital expenses" means only expenditures for noninstructional goods and services that are incurred as a result of implementation of alternative delivery systems to comply with the requirements of *Aguilar* v. *Felton*. These expenditures—

(i) Include—

(A) The purchase, lease, and renovation of real and personal property (including but not limited to mobile educational units and leasing of rental sites or space);

(B) Insurance and maintenance costs;

(C) Transportation; and

(D) Other comparable goods and services; and

(ii) Do not include the purchase of instructional equipment such as computers.

(b) The LEA's application for payments under this section must contain—

(1) The amount, by fiscal year, of capital expenses paid from funds under this part and Chapter 1 of the ECIA since July 1, 1985;

(2) The nature of the capital expenses;

(3) An assurance that the LEA will use payments received under this section in accordance with § 200.58;

(4) An assurance that the LEA has consulted with appropriate private school officials in preparation of its application;

(5) If appropriate, information sufficient to support anticipated increases in the number or percentage of private school children to be served; and

(6) Any other information the SEA may need to make a determination of need under paragraph (c) of this section.

(c) An SEA shall distribute funds it receives under § 200.56 to LEAs that apply on the basis of need. In determining need, the SEA shall establish criteria such as the following:

(1)(i) The extent to which payments under this section would be used by an LEA to increase the number or percentage of private school children served; or

(ii) The extent to which an LEA is providing Chapter 1 services to at least the same number or percentage of private school children the LEA served during the period July 1, 1984 through June 30, 1985.

(2) The degree to which the quality of services an LEA is providing or would provide to private school children equals or exceeds the quality of services provided during the period July 1, 1984 through June 30, 1985.

(3) The percentage of funds the LEA has paid for capital expenses in relation to its basic Chapter 1 grant.

(Approved by the Office of Management and Budget under control number 1810-0504)

(Authority: 20 U.S.C. 2727(d))

[54 FR 21756, May 19. 1989;54 FR 27793, June 30, 1989, as amended at 54 FR 30737, July 24, 1989]

§ 200.58 How does an LEA use payments for capital expenses?

(a) An LEA shall use payments received under § 200.57 for the following:

(1) To provide Chapter 1 services to benefit, to the extent possible, the public and private school children who were or are adversely affected by the LEA's expenditures for capital expenses.

(2) To cover capital expenses the LEA is incurring or will incur to maintain or increase the number or percentage of private school children being served.

(b) The LEA may not take the payments received under § 200.57 into account in meeting the requirements in § 200.52.

(c) The LEA shall account separately for payments received under § 200.57.

(Authority: 20 U.S.C. 2727 (a), (d))

[54 FR 21756, May 19. 1989;54 FR 27793, June 30, 1989]

§ 200.59 [Reserved]

BYPASS

§ 200.60 What general requirements govern the implementation of a bypass?

(a) The Secretary implements a bypass in accordance with the procedures in 34 CFR 76.670 through 76.677 if—

(1) An LEA is prohibited by law from providing Chapter 1 services for private school children on an equitable basis; or

(2) The Secretary determines, following a complaint or an investigation that an LEA has substantially failed to provide for the participation on an equitable basis of private school children.

(b) If the Secretary implements a bypass, the Secretary—

(1) Waives the LEA's responsibility for providing Chapter 1 services for private school children and arranges to provide the required services;

(2) Consults with appropriate public and private school officials; and

(3) Deducts the costs of the services including any administrative costs from the appropriate allocations of funds provided under this part to the affected LEA and SEA.

(c) Pending the final resolution of an investigation or a complaint that could result in a bypass action, the Secretary may withhold from the allocation of the affected LEA or SEA the amount the Secretary estimates is necessary to pay the cost of the services referred to in paragraph (b) of this section.

(Authority: 20 U.S.C. 2727(b))

§§ 200.61–200.69 [Reserved]

Subpart G—What Are Other State Responsibilities for the Chapter 1 LEA Program?

§ 200.70 Does a State have authority to issue State regulations for the Chapter 1 LEA Program?

(a)(1) Except as provided in paragraph (b) of this section, Chapter 1 does not preempt, prohibit, or encourage State rules, regulations, or policies issued pursuant to State law.

(2) If a State issues rules, regulations, or policies, they may not be inconsistent with the provisions of the following:

(i) The Chapter 1 statute.

(ii) The regulations in this part

(iii) Other applicable Federal statutes and regulations.

(b) A State may not issue rules, regulations, or policies that limit LEAs' decisions affecting funds received under this part regarding—

(1) Grade levels to be served;

(2) Basic skill areas to be addressed;

(3) Instructional settings, materials, or teaching techniques to be used;

(4) Instructional staff to be employed, so long as the staff meets State certification and licensing requirements for education personnel; or

(5) Other essential support services.

(c) Nothing in paragraph (b) of this section limits an SEA's—

(1) Responsibility to work jointly with an LEA in suggesting various activities and approaches for program improvement under §§ 200.37-200.38;

(2) Authority to review and approve an LEA's application including determining that the activities in the application are supported by the LEA's needs assessment; or

(3) Responsibility to ensure that an LEA uses funds under this part in accordance with all applicable requirements.

(d) The State shall identify any State rule, regulation, or policy relating to the administration and operation of Chapter 1 programs funded under this part, including those based on State interpretation of any Federal law, regulation, or guideline, as a State-imposed requirement.

(e)(1)(i) Except as provided in paragraph (e)(1) (ii) and (iii) of this section, if a State issues major rules or regulations relating to the administration or operation of programs funded under this part, the State shall convene a State committee of practitioners to review before publishing any major proposed or final rule or regulation.

(ii) In an emergency situation in which a major rule or regulation must be issued within a very limited time to assist LEAs with the operation of programs under this part, the State—

(A) May issue the regulation without consulting the committee of practitioners; but

(B) Shall immediately thereafter convene the State committee of practitioners to review the emergency rule or regulation prior to issuance in final form.

(iii) The State shall ensure that the committee of practitioners reviews non-major rules or regulations before publication.

(2) If a State does not issue rules or regulations relating to the administration or operation of programs under this part but issues policies that the SEA and LEAs are required to follow, the State must comply with the requirements in this section for issuing rules and regulations.

(3)(i) The committee of practitioners must include—

(A) Administrators;

(B) Teachers;

(C) Parents;

(D) Members of local boards of education; and

(E) Representatives of private school children.

(ii) A majority of the committee must be representatives of LEAs.

(iii) Members of the committee must be knowledgeable about the Chapter 1 LEA Program.

(4) SEAs are encouraged to request from appropriate organizations recommendations for membership on the committee.

(Authority: 20 U.S.C. 2851)

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[54 FR 21756, May 19. 1989; 54 FR 27793, June 30, 1989]

§ 200.71 How may State personnel paid with funds available under this part be assigned to State programs?

(a) As provided in paragraph (b) of this section, an SEA may use funds received under § 200.72(a) to pay the salary costs for any employee assigned to programs funded under this part and special State programs that meet the requirements of § 200.45(a)(1) (i) and (2).

(b) Except as provided in paragraph (c) of this section, salary costs are allowable charges to funds received under § 200.72(a) if the following conditions are met:

(1) An employee's assignments are related to the SEA's administrative, training, and technical assistance responsibilities under the programs.

(2) The SEA maintains contemporaneous time distribution records reflecting the actual amount of time the employee spends on the programs.

(3) The time distribution records are signed by the employee's supervisor.

(4) Actual costs are charged to the programs on the basis of the employee's time distribution records.

(c) If an employee is assigned administrative, training, and technical assistance duties that jointly benefit programs funded under this part and special State programs that meet the requirements of § 200.45 (a)(1)(i) and (a)(2), costs may be charged to the programs on a basis other than the time spent on each of the programs, provided charges are equitably distributed among funding sources.

EXAMPLE. An employee spends three hours developing a manual for LEAs to use to improve parent participation in compensatory programs supported with funds under this part and under a State compensatory education program. Since only one manual is produced, the employee is unable to divide the actual time spent on each program. Therefore, the LEA may prorate costs, for example, to each program on the basis of the proportion of funds allocated for each of the programs benefiting from the manual.

(Authority: 20 U.S.C. 2853(b))

[54 FR 21756, May 19. 1989; 54 FR 27793, June 30, 1989]

§ 200.72 What funds are available for an SEA to carry out its responsibilities?

(a) *Funds for State administration.* (1) Except for programs under Part C of Chapter 1 and as provided in paragraph (a)(2) of this section, an SEA shall use funds received under section 1404(a) of the Act for the proper and efficient performance of its duties under Chapter 1.

(2) The SEA may not use more than 15 percent of the funds referred to in paragraph (a)(1) of this section for indirect costs.

(b) *Funds for implementing school improvement programs.* (1) An SEA shall use funds made available under section 1405 of the Act for direct educational services in schools implementing program improvement plans under § 200.38(b)

(2) Parents of participating children, school staff, the LEA, and the SEA shall jointly agree to the selection of providers of technical assistance and the best use of funds available under paragraph (b)(1) of this section, which may include assistance from—

(i) An institution of higher education;

(ii) A federally supported educational laboratory or center;

(iii) State personnel with expertise in educational improvement;

(iv) Locally, State, or nationally based consultants; and

(v) Other providers of the specific services required by a school's program improvement plan.

(3) The SEA may not use the funds referred to in paragraph (b)(1) of this section for State administration.

(Authority: 20 U.S.C. 2824, 2825)

COMPLAINT PROCEDURES OF THE SEA

§ 200.73 What complaint procedures shall an SEA adopt?

An SEA shall adopt written procedures for:

(a) Receiving and resolving any complaint that the SEA or an LEA is violating a Federal statute or regulations that apply to the Chapter 1 LEA Program;

(b) Reviewing an appeal from a decision of an LEA with respect to a complaint; and

(c) Conducting an independent on-site investigation of a complaint if the SEA determines that an on-site investigation is necessary.

(Authority: 20 U.S.C. 2831(a))

[54 FR 21756, May 19, 1989; 54 FR 27793, June 30, 1989]

§ 200.74 What are the minimum complaint procedures?

An SEA shall include the following in its complaint procedures:

(a) A time limit of 60 calendar days after the SEA receives a complaint:

(1) If necessary, to carry out an independent on-site investigation; and

(2) To resolve the complaint.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) The right to request the Secretary to review the final decision of the SEA.

(Authority: 20 U.S.C. 2831(a))

§ 200.75 How does an organization or individual file a complaint?

An organization or individual may file a written signed complaint with an SEA. The complaint must include:

(a) A statement that the SEA or an LEA has violated a requirement of a Federal statute or regulations that apply to the Chapter 1 LEA Program; and

(b) The facts on which the statement is based.

(Authority: 20 U.S.C. 2831(a))

§§ 200.76—200.79 [Reserved]

Subpart H—What Are the National Evaluation Standards?

EVALUATION BY AN LEA

§ 200.80 How does an LEA evaluate student achievement?

(a) An LEA shall evaluate student achievement under § 200.35(a)(1)(ii) as follows:

(1)(i) The LEA shall assess—

(A) The Chapter 1 participants' achievement in reading, mathematics, and language arts, not including projects designed to teach English to limited English speaking children, in grades 2 through 12, as appropriate, after receiving Chapter 1 services; compared to

(B) An estimate of what their achievement would have been in the absence of Chapter 1 services.

(ii) In assessing achievement in language arts, an LEA may use tests designed to measure language arts or reading. If a reading test is used, the LEA shall assess achievement in both basic and more advanced skills.

(2) With regard to more advanced skills, the LEA shall assess the progress of Chapter 1 participants as measured by—

(i) (A) The "comprehension" or equivalent score of a nationally normed reading test; and

(B) The "problems and applications" or equivalent score of a nationally normed mathematics test; or

(ii) A test without national norms if—

(A) It is the instrument used for other required achievement reporting under this part;

(B) It provides an appropriate "comprehension" and "problems and applications" score; and

(C) The LEA meets the conditions in § 200.82(b)(2).

(b)(1) The LEA shall measure student achievement under paragraph (a) of this section over a period of approximately 12 months.

(2)(i) Except as provided in paragraph (b)(2)(ii) of this section, the LEA shall report on either a spring-to-spring testing interval or a fall-to-fall testing interval.

(ii) An LEA that measured achievement on a fall-spring testing interval during the 1988-89 school year may continue to do so for one additional year only (the 1989-90 school year) if the SEA determines that implementation of the annual cycle in 1989-90 would impose a substantial hardship on the LEA.

EXAMPLE: An LEA uses the results of a pre-test administered in September 1988 and a post-test administered in May 1989 to measure and report on the achievement of children participating in projects under this part during the 1988-89 school year. The SEA determines that it would be a substantial hardship for the LEA to measure and report on children's achievement for the

1989-90 school year on either a spring-to-spring or fall-to-fall testing interval. Therefore, the LEA may continue to report on participating children's achievement on a fall-spring testing interval for the 1989-90 school year. However, the LEA must report on participating children's achievement in school year 1990-91 using either: pre-tests administered during the fall of 1990 and post-tests administered during the fall of 1991; or pre-tests administered during the spring of 1990 and post-tests administered during the spring of 1991.

(c)(1) At least once during the three-year evaluation period required under § 200.35(a), the LEA shall collect additional information to determine whether student achievement gains are sustained over a period of more than 12 months (see § 200.35(a)(2)).

(2) The LEA shall report this information on either a spring-spring-spring testing interval or a fall-fall-fall testing interval.

(d) In estimating expected performance under paragraph (a)(1)(ii) of this section and elsewhere in this subpart, the LEA shall use the performance of children in a norm sample developed locally, by the SEA, or by a test publisher.

(e) Any test instrument used by the LEA under this subpart must be the current edition or the immediately previous edition.

(Approved by the Office of Management and Budget under control number 1810-0037)

(Authority: 20 U.S.C. 2729(a), (c), 2835)

[54 FR 21756, May 19, 1989; 54 FR 27793, June 30, 1989, as amended at 54 FR 30737, July 24, 1989]

§ 200.81 What technical standards does an LEA apply in evaluating student achievement?

An LEA shall ensure that its procedures for evaluating the achievement of children in programs under this part are consistent with the following technical standards:

(a) Representativeness of evaluation findings.

(b) Reliability and validity of evaluation instruments and procedures.

(c) Valid assessment of achievement gains.

(d) Quality control mechanisms to minimize error in evaluation procedures.

(Authority: 20 U.S.C. 2729(a), 2835)

§ 200.82 What procedures does an LEA use in evaluating student achievement?

Unless it is using approved alternative procedures under § 200.83, an LEA shall use the following procedures to evaluate student achievement in each Chapter 1 project funded under this part that provides instructional services in reading, language arts, or mathematics in grades 2 through 12 during the regular school year:

(a) The LEA shall administer a pretest and a posttest separated by approximately 12 months.

(b) The LEA may use a test with or without national norms as follows:

(1) If the LEA uses a test with national norms, the LEA shall administer the test within the appropriate range of the test publisher's norming dates.

(2) If the LEA uses a test without national norms, the LEA shall adhere to technical requirements for equating this test with a nationally normed test as specified by the Title I Evaluation and Reporting System or other valid methods accepted by the Secretary.

(Approved by the Office of Management and Budget under control number 1810-0037)

(Authority: 20 U.S.C. 2729(a), 2835)

[54 FR 21756, May 19, 1989, as amended at 54 FR 30737, July 24, 1989]

§ 200.83 What alternative procedures may an LEA use?

(a) An LEA may use alternative procedures to those in § 200.82 for evaluating student achievement if, before using the alternative procedures, the LEA obtains the approval of, first, the SEA and, then, the Secretary.

(b) In order for the SEA and the Secretary to approve alternative procedures, the LEA shall demonstrate that the procedures—

(1) Yield a valid and reliable measure of—

(i) The Chapter 1 children's performance in reading, language arts, or mathematics; and

(ii) The children's expected performance; and

(2) Produce results that can be expressed in the common reporting scale

established by the Secretary for SEA reporting.

(Approved by the Office of Management and Budget under control number 1810-0037)

(Authority: 20 U.S.C. 2729(a), 2835)

[54 FR 21756, May 19, 1989, as amended at 54 FR 30737, July 24, 1989]

§ 200.84 How does an LEA report the results of student achievement to the SEA?

(a)(1) In reporting the results of student achievement evaluated under §§ 200.80-200.83, an LEA shall use—

(i) The common reporting scale established by the Secretary for SEA reporting; or

(ii) Another form of local reporting approved by the SEA.

(2) If the SEA approves another form of reporting, the LEA shall include sufficient information to enable the SEA to convert the achievement results to the common reporting scale.

(b) Unless requested by the SEA, the LEA is not required to include in its evaluation report the results of the long-term evaluation required under § 200.80(c).

(Approved by the Office of Management and Budget under control number 1810-0037)

(Authority: 20 U.S.C. 2729(a) 2835)

[54 FR 21756, May 19, 1989, as amended at 54 FR 30737, July 24, 1989]

Evaluation by An SEA

§ 200.85 What technical standards does an SEA use in conducting its evaluation?

In conducting its evaluation under § 200.35(b), an SEA shall use technical standards that are commensurate with and appropriately reinforce those required of LEAs in § 200.81.

(Authority: 20 U.S.C. 2729(b), 2835)

§ 200.86 What requirements govern an SEA sampling plan?

(a) If the SEA wishes to use sampling in its evaluation of programs conducted under this part, the SEA shall submit, for prior approval by the Secretary, a proposed sampling plan designed to ensure that evaluations will be conducted in a representative sample of its LEAs in any school year.

(b) The Secretary approves a sampling plan that will provide reliable and representative data under this subpart.

(c) (1) The SEA shall review its sampling plan at least once every three years.

(2) If, based on this review or other circumstances, the sampling plan requires changes, the SEA shall request reapproval of the plan by the Secretary.

(Authority: 20 U.S.C. 2835)

§ 200.87 How does an SEA aggregate LEA student achievement data for inclusion in its evaluation?

(a) An SEA shall include, for all LEAs, or a sample of LEAs if a sampling plan has been approved by the Secretary, the following information in its evaluation:

(1) A statewide average of student achievement gains resulting from participation in Chapter 1 projects under this part reported for—

(i) Each participating grade level from 2 through 12; and

(ii) Each of the following subjects: reading, mathematics, and language arts.

(2) A statewide average of progress students are making in more advanced skills, separately for reading and mathematics.

(3) Additional data specified by the Secretary.

(4) If applicable—

(i) The number of students excluded from the evaluation because of erroneous or missing data; and

(ii) The reasons for the exclusion.

(b) The SEA shall—

(1) Report student achievement gains on either a spring-to-spring or fall-to-fall basis; and

(2) Express each statewide average achievement gain in the common reporting scale established by the Secretary.

(Approved by the Office of Management and Budget under control number 1810-0037)

(Authority: 20 U.S.C. 2729(b), 2835)

[54 FR 21756, May 19, 1989, as amended at 54 FR 30737, July 24, 1989]

ALLOWABLE AND NONALLOWABLE COSTS

§ 200.88 For what evaluation activities may an LEA or SEA use funds available under this part?

(a) An LEA or SEA may use funds made available under this part for any of the following evaluation activities:

(1) Identifying specific strengths and weaknesses of a project.

(2) Determining the results of a project.

(3) Disseminating the results of Chapter 1 evaluations.

(b) In addition to the requirement concerning the supplementary nature of funds available under this part in § 200.44 and other rules governing the allowability of Chapter 1 expenditures, the provisions of paragraph (c) of this section apply to the use of funds available under this part to support the purchase, administration, scoring, and analysis of evaluation instruments.

(c) Except for cases in which data meeting these needs are already available, the LEA or SEA may use funds available under this part for any of the following:

(1) Testing Chapter 1 participants for evaluation purposes only.

(2) In order to permit the LEA or SEA to convert its evaluation results to the common scale, administering a nationally normed test to all, or a representative sample of, the Chapter 1 participants if the LEA or SEA has used a test without national norms for evaluation purposes.

(3) Testing an appropriate number of children no longer receiving Chapter 1 services to determine whether achievement gains are sustained over a period of more than 12 months (see § 200.35(a)(2)).

(Authority: 20 U.S.C. 2721(a), 2728(b), 2729(a), 2835)

§ 200.89 For what evaluation activities may an LEA or SEA not use funds available under this part?

An LEA or SEA may not use funds available under this part for any of the following evaluation activities:

(a) General districtwide or statewide testing programs.

(b) Establishing local or State norms.

(c) Development of tests to meet the standards in this subpart.

(Authority: 20 U.S.C. 2721(a), 2728(b))

PART 201—CHAPTER 1—MIGRANT EDUCATION PROGRAM

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AUTHORITY: 20 U.S.C. 2781-2782, unless otherwise noted.

SOURCE: 50 FR 18409, Apr. 30, 1985, unless otherwise noted.

Subpart A—Applying for Chapter 1 Migrant Education Program Funds

GENERAL

§ 201.1 Purpose.

The Migrant Education Program, authorized by sections 1201 and 1202 of Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965 is designed to—

(a) Provide financial assistance to State educational agencies (SEAs) to establish or improve programs of education designed to meet the special educational needs of migratory children of migratory agricultural workers (including migratory agricultural dairy workers) or migratory fishers; and

(b) Enable these SEAs to coordinate their migrant education programs and local migrant education projects with similar programs and projects in other States, including the transfer of school records and other information about eligible migratory children.

(Authority: 20 U.S.C. 2781)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43223, Oct. 23, 1989]

§ 201.2 Regulations that apply.

The following regulations apply to the Chapter 1—Migrant Education Program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 76 (State-Administered Programs) as follows:

(i) Subpart A (General), except for § 76.3 (ED general grant regulations apply to these programs).

(ii) Sections 76.125 through 76.137 (Consolidated Grant Applications for Insular Areas).

(iii) Section 76.401 (Disapproval of an application—opportunity for a hearing).

(iv) Subpart F (What Conditions Must be Met by the State and its Subgrantees?), except for the following sections:

(A) Sections 76.580 through 76.581 (Coordination).

(B) Sections 76.650 through 76.662 (Participation of Students Enrolled in Private Schools).

(C) Section 76.684 (Day care services).

(D) Section 76.690 (Energy conservation awareness).

(v) Subpart G (What Are the Administrative Responsibilities of the State and Its Subgrantees?), except for the following sections:

(A) Sections 76.770 through 76.772 (State Administrative Responsibilities).

(B) Section 76.780 (A State shall adopt complaint procedures).

(C) Section 76.781 (Minimum complaint procedures).

(D) Section 76.782 (An organization or individual may file a complaint).

(vi) Subpart H (What Procedures Does the Secretary Use to Get Compliance?).

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 78 (Education Appeal Board).

(4) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), unless a State formally adopts its own written fiscal and administrative requirements for expending and accounting for all funds received by SEAs and operating agencies under this part. These requirements must be available for Federal inspection and must—

(i) Be sufficiently specific to ensure that funds received under this part are used in compliance with all applicable statutory and regulatory provisions;

(ii) Ensure that funds received under this part are only spent for reasonable and necessary costs of operating programs under this part; and

(iii) Ensure that funds received under this part are not used for general expenses required to carry out other responsibilities of State or local governments.

(6) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(7) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements For Drug-Free Workplace (Grants)).

(b) The regulations in this part 201.

(Authority: 20 U.S.C. 2781, 2831)

[54 FR 43224, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

Effective Date Note: At 55 FR 22017, May 30, 1990, in § 201.2 paragraph (a)(5) was amended by removing "LEAs" and adding, in its place, the words "operating agencies", effective either 45 days after publication in the Federal Register or later if Congress takes certain adjournments. The Department of Education will publish a document in the Federal Register at a later date, announcing the effective date.

§ 201.3 Definitions for this program.

(a) *Definitions in the Elementary and Secondary Education Act.* The following terms used in this part are defined in section 1471 of the Act:

Equipment
Free public education
Local educational agency (LEA)
Parent
Parent advisory council
Secretary
State educational agency (SEA)

(b) *Other definitions.* In addition to the terms defined in the applicable regulations listed in § 201.2, or referred to in paragraph (a) of this section, the following definitions apply to this part:

Act means Elementary and Secondary Education Act of 1965, as amended.

Agricultural activity means:

(1) Any activity directly related to the production or processing of crops, dairy products, poultry, or livestock for initial commercial sale or as a principal means of personal subsistence;

(2) Any activity directly related to the cultivation or harvesting of trees; or

(3) Any activity directly related to fish farms.

Chapter 1 means Chapter 1 of Title 1 of the Act.

Children means—

(1) Persons up through age 21 who are entitled to a free public education through grade 12: and

(2) Preschool children.

Currently migratory child means a child:

(1) Whose parent or guardian is a migratory agricultural worker or a migratory fisher; and

(2) Who has moved within the past 12 months from one school district to another—or, in a State that is comprised of a single school district, has moved from one school administrative area to another—to enable the child, the child's guardian, or a member of the child's immediate family to obtain temporary or seasonal employment in an agricultural or fishing activity. This definition includes a child who has been eligible to be served under the requirements in the preceding sentence, and who, without the parent or guardian, has continued to migrate annually to enable him or her to secure temporary or seasonal employment in an agricultural or fishing activity. This definition also includes children of migratory fishermen, if those children reside in a school district of more than 18,000 square miles and migrate a distance of 20 miles or more to temporary residences to engage in fishing activity.

Fiscal Year means the Federal fiscal year—a period beginning on October 1 and ending on the following September 30—or another 12-month period normally used by the SEA for recordkeeping.

Fishing activity means any activity directly related to the catching or processing of fish or shellfish for initial commercial sale or as a principal means of personal subsistence.

Formerly migratory child means a child who:

(1) Was eligible to be counted and served as a currently migratory child within the past five years, but is not now a currently migratory child; and

(2) Has the concurrence of his or her parent or guardian to continue to be considered a migratory child.

Guardian means a person who:

(1) Has been appointed to be the legal guardian of a child through formal proceedings in accordance with State law;

(2) An SEA determines would be appointed to be the legal guardian of a

child under the law of the child's domiciliary State if formal guardianship proceedings were undertaken; or

(3) Is standing in the place of a parent to a child.

Migratory agricultural worker means a person who has moved within the past 12 months from one school district to another—or, in a State that is comprised of a single school district, has moved from one school administrative area to another—to enable him or her to obtain temporary or seasonal employment in an agricultural activity (including dairy work).

Migratory children means children who qualify under either the definition of "currently migratory child" or "formerly migratory child" described in this section.

Migratory fisher means a person who has moved within the past 12 months from one school district to another—or, in a State that is comprised of a single school district, has moved from one school administrative area to another—to enable him or her to obtain temporary or seasonal employment in a fishing activity.

Operating agency means:

(1) A local educational agency (LEA) to which an SEA makes a subgrant of migrant education program funds;

(2) A public or nonprofit private agency with which an SEA or the Secretary makes an arrangement to carry out a migrant education project; or

(3) An SEA, if the SEA operates the State's migrant education program or projects directly.

Preschool children means children who are—

(1) Below the age and grade level at which the agency provides free public education; and

(2) Of the age or grade level at which they can benefit from an organized educational program provided in a school or educational setting.

(Authority: 20 U.S.C. 2781, 2782, 2831)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43224, Oct. 23, 1989; 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.3(b) the definition of "Preschool children" was amended amended by removing the wod "instructional" wherever it appeared and adding, in its place, the word "educational", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§§ 201.4—201.9 [Reserved]

APPLYING FOR A STATE GRANT

§ 201.10 Eligibility of an SEA to participate as a grantee.

(a) An SEA may apply to the Secretary for a grant to operate a State migrant education program directly, through subgrants to LEAs, or through subgrants or other arrangements with public or nonprofit private agencies.

(b) Two or more SEAs may apply jointly for a grant to support a migrant education program that benefits eligible migratory children in those States.

(Authority: 20 U.S.C. 2781)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43224, Oct. 23, 1989]

§ 201.11 Documents an SEA must submit to receive a grant.

(a) *General.* An SEA that wishes to receive funds under this part for an SEA program designed to meet the special educational needs of migratory children shall submit and annually update an application to the Secretary that meets the requirements in section 1202(a) of the Act.

(b) *SEA assurances.* The SEA shall also provide assurances, which will remain in effect for the duration of its participation in the program under this part, that the SEA will—

(1) Meet the requirements in section 435(b)(2) and (5) of the General Education Provisions Act (GEPA) as they relate to fiscal control and fund accounting procedures;

(2) Meet the requirements of section 1202(a)(5) of Chapter 1 that provision be made for the preschool educational needs of migratory children;

(3) Carry out the evaluation requirements in §§ 201.51 through 201.56; and

(4) Ensure that its subgrantee agencies comply with all applicable statutory and regulatory requirements.

(c) *SEA application.* To receive a Chapter 1 migrant education program grant, an SEA shall submit to the Secretary an application to cover a period of not more than three fiscal years, including the first fiscal year for which a grant is made under that application. During subsequent years, the SEA's application must incorporate any updating reports arising from significant changes in the number or needs of children to be served, or the services to be provided.The application must be specific and contain sufficient information to allow the Secretary to determine whether the State's program and projects will satisfy the requirements of Chapter 1 and the applicable regulations for each year.

(d) *Further updating of information in the application.* If, during the course of the project year, there are significant changes in number or needs of the children to be served or the services to be provided, the SEA shall submit a description of those changes to the Secretary together with the impact of the changes on the chapter 1 migrant education budget, program, and projects.

(Approved by the Office of Management and Budget under control number 1810-0029)

(Approved by the Office of Management and Budget under control number 1810-0519)

(Authority: 20 U.S.C. 1232d(b)(2), (5), 2722, 2729(b), 2781, 2782, 2731, 2838(c))

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43224, Oct. 23, 1989; 55 FR 6982, Feb. 28, 1990]

§ 201.12 [Reserved]

§ 201.13 Approval of an SEA's application.

(a) *Standards for approval.* The Secretary approves an SEA's application and any updating amendments if the proposed State migrant education program:

(1) Complies with the Chapter 1 statute and the applicable regulations;

(2) Is designed to meet the special educational needs of eligible migratory children; and

(3) Holds reasonable promise of making substantial progress toward meeting those needs.

(b) *Effect of approval.* The Secretary's approval of an application under this section requires the SEA to perform in accordance with its application, application requirements, and updating amendments, if any.

(Approved by the Office of Management and Budget under control number 1810-0504)

(Authority: 20 U.S.C. 2781, 2782)

§§ 201.14—201.15 [Reserved]

APPLYING TO AN SEA FOR A SUBGRANT

§ 201.16 Documents that an operating agency must submit to apply for a subgrant.

An operating agency that desires to receive a subgrant shall submit to the SEA, under the procedures in § 201.17, a project application that is developed in consultation with teachers and parents, and that is specific enough to allow the SEA to determine if the proposed local migrant education project satisfies the applicable requirements in the Chapter 1 statute, the applicable regulations, and the provisions of the approved SEA application.

(Approved by the Office of Management and Budget under control number 1810-0504)

(Authority: 20 U.S.C. 2722, 2781)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43225, Oct. 23, 1989]

Effective Date Note: At 54 FR 43225, October 23, 1989, § 201.16 was amended by removing "LEA" in the heading and the text and adding, in its place, the words "operating agency", adding the words "developed in consultation with teachers and parents, and that is" before the word "specific", and revising the authority citation, effective after the information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980.

§ 201.17 Submission of a project application to the SEA.

(a) *Frequency of submission.* An LEA, or other operating agency, shall submit a project application to the SEA for a period of not more than three fiscal years, including the first fiscal year for which a subgrant would be made under that application.

(b) *Contents of the application.* The project application must include—

(1) Information consistent with the SEA's approved application regarding—

(i) The operating agency's separate annual assessments of the educational needs of its currently and formerly migratory children and the selection of children with the greatest needs (consistent with the service priorities in § 201.31);

(ii) A description of the local Chapter 1 migrant education project to be conducted and how those projects will meet the general instructional program goals the SEA has established. The description must contain—

(A) A separate summary of the project's components that are designed to meet the unmet needs of the currently migratory children expected to be served; and

(B) An estimate of the number of currently migratory children expected to participate in each component; and

(iii) A description of the desired outcomes in terms of basic and more advanced skills that participating children are expected to master and in terms of related support services the LEA will provide;

(2) A budget for the expenditure of Chapter 1—Migrant Education Program funds that, to the extent possible, separately summarizes the estimated costs of project components that would benefit the currently migratory children the agency plans to serve;

(3) Assurances that—

(i) The programs and projects described in the application have been planned and will be carried out in a manner consistent with the requirements in §§201.35 and 201.36; and

(ii) If appropriate, the agency has established procedures to ensure comparability of services as required by § 201.44;

(4) The assurances in section 436(b)(2) and (b)(3) of GEPA as they relate to fiscal control and fund accounting procedures; and

(5) Information the SEA needs to ensure that—

(i) The operating agency's project comports with activities described in the SEA's approved application submitted under § 201.11;

(ii) The operating agency complies with the assurances in paragraphs (b)(3) and (c)(1) of this section; and

(iii) The SEA has data, if those data are not otherwise available to the SEA, that the LEA has maintained effort in accordance with § 201.41.

(c) *Annual updating of information in the application.* An LEA shall annually update its project application by submitting to its SEA:

(1) Data showing that the LEA, if it annually provided services for migratory children, has maintained fiscal effort under § 201.41, if those data are not otherwise available in the SEA;

(2) A budget for the expenditure of Chapter 1 migrant education funds;

(3) Any additional updating resulting from significant changes in the number or needs of children to be served, or the services to be provided; and

(4) Other information that the SEA may request.

(Authority: 20 U.S.C. 2722, 2781, 2782)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43225, Oct. 23, 1989]

Effective Date Note: At 54 FR 43225, October 23, 1989, § 201.17 was amended by revising the section heading, paragraphs (a), (b), (c)(1), and the authority citation, effective after the information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. For the convenience of the user the superseded text is set forth as follows:

§ 201.17 Submission of an LEA's project application to the SEA.

(a) *Frequency of submission.* An LEA shall submit a project application to the SEA for a period of not more than three fiscal years, including the first fiscal year for which a subgrant would be made under that application.

(b) *Contents of the application.* The project application must include:

(1) A description of the local Chapter 1 migrant education project to be conducted;

(2) A budget for the expenditure of Chapter 1 migrant education program funds;

(3) The assurances in section 556(b)(2) through (b)(5) of Chapter 1;

(4) The assurances in section 436(b)(2) and (b)(3) of GEPA; and

(5) Information that the SEA needs to ensure that the project comports with activities described in the SEA's application as provided in § 201.12.

(c) * * *

(1) Data showing that the LEA has maintained fiscal effort on the same basis as is required for LEAs by section 558(a) of Chapter 1;

* * * * *

(Authority: Sec. 555, 20 U.S.C. 3804; sec. 556, 20 U.S.C. 3805; sec. 596, 20 U.S.C. 3876; Title I, sec. 142(a), 20 U.S.C. 2762(a))

§ 201.18 Approval of an LEA's project application for a subgrant.

(a) *Standards for approval.* An SEA may approve an LEA's, or other operating agency's, application for a subgrant only if—

(1) The application meets the requirements of § 201.17 and is consistent with the content of the approved SEA application; and

(2) The SEA first determines that the LEA—

(i) Maintained fiscal effort in accordance with § 201.41; or

(ii) If the LEA failed to maintain fiscal effort, has modified or updated its application to take into account any required reduction in the indirect costs that otherwise could be charged to its subgrant.

(b) *Effect of approval.* SEA approval of a project application under paragraph (a) of this section requires the operating agency to administer and operate its project in accordance with its application, any amendments, and project requirements in §§ 201.30-201.35. That approval, however, does not create for the operating agency an entitlement to receive a subgrant for a period other than the first fiscal year.

(Authority: 20 U.S.C. 2781, 2782, 2831)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43225, Oct. 23, 1989; 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.18 paragraph (a)(2)(i) was amended by removing "§ 201.40" and adding, in its place, "§ 201.41", and paragraph (b) was amended by removing "LEAs" wherever it appears and adding, in its place, the words "operating agencies", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.19 [Reserved]

Subpart B—Determining the Amount of Grants and Subgrants

§ 201.20 Amount available for an SEA grant.

(a) *General.* (1) The Secretary determines for each fiscal year the amount of the Chapter 1 migrant education program grant for which the SEA in each State may apply according to section 1201 of chapter 1 and the funds appropriated for grants to States under that section.

(2) In applying section 1201(b)(1) of chapter 1, the Secretary determines for each fiscal year the number of migratory children (as defined in § 201.3) aged three through twenty-one in each State on the basis of statistics from the Migrant Student Record Transfer System (MSRTS) or from any other system that the Secretary determines most accurately and fully reflects the actual number of migratory children residing in the State. Each SEA is required to submit accurate data that are necessary to make these determinations.

(3) If, regardless of funding source, a project exists that is designed to assist migrant families who are in transit to locations in other areas to obtain temporary or seasonal employment in an agricultural or fishing activity, the SEA may enroll migratory children who pass through the project site in

the MSRTS or other system as a resident of the project's State only as follows:

(i) For a child in transit to a location in another State where the employment will be sought, the SEA may enroll the child as a resident of the SEA's own State only for the period the child resides at the project site.

(ii) For a child in transit to a location within its own State where employment will be sought, the State may enroll the child as a resident of the SEA's own State without restriction.

(b) *Special summer formula.* In making the adjustment required by section 1201(b) of chapter 1 to reflect the special needs of migratory children for summer projects and the additional costs of operating those projects, the Secretary uses the best available information from the MSRTS or other system about the cost of operating summer projects and the number of children in each State participating in those projects.

(Approved by the Office of Management and Budget under control number 1810-0520)

(Authority: 20 U.S.C. 2781, 2782, 2831)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43225, Oct. 23, 1989; 55 FR 6982, Feb. 28, 1990]

§ 201.21 Determination of an SEA grant.

(a) *Estimated cost of a State migrant education program.* (1) An applicant SEA is entitled to receive a Chapter 1 migrant education grant in the amount the Secretary determines for each fiscal year, on the basis of the best information available to the Secretary at the time, is necessary to carry out the activities in its application.

(2) This amount may not exceed the total amount available to that SEA as determined by the Secretary under § 201.20.

(b) *Consideration of the cost of past and future activities and the amount of funds available.* In determining the amount of the Chapter 1 migrant education program grant to which an SEA is annually entitled, the Secretary considers:

(1) The amount for which the SEA may apply, as determined under § 201.20;

(2) The cost of completed program activities under previous migrant education program grants, under section 1201 of Chapter 1, and the number of children who were served;

(3) The estimated cost of activities not yet begun under the preceding grant and the number of children who will be served;

(4) In the case of a request for an increase in the grant that the Secretary previously determined to be necessary to carry out the annual activities in the approved SEA application, the estimated cost of providing additional program services before the end of the grant period and the number of children who would receive additional services;

(5) The unused amount of the SEA's preceding migrant education program grant; and

(6) Any other relevant information.

(Authority: 20 U.S.C. 2781, 2782)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43226, Oct. 23, 1989]

§ 201.22 Reallocation of excess funds.

(a) If the Secretary determines that the annual amount for which an SEA may apply, as determined under § 201.20, is more than the amount needed to carry out the activities in its application for that year, the Secretary may allocate some or all of this excess to one or more other SEAs whose amounts available under §§ 201.20 and 201.21 would otherwise be insufficient to serve the eligible migratory children in those States.

(b) The Secretary notifies an SEA if part of the amount available to it is being considered for reallocation. The SEA may—within 15 days after receiving that notice—request an opportunity to explain why a reallocation is not warranted. If the SEA does not request an opportunity to explain, or if—after the explanation—the Secretary determines that the total amount available to the SEA for that fiscal year exceeds the amount needed, the Secretary may reallocate the amount in excess.

(Authority: 20 U.S.C. 2781, 2782)

§ 201.23 Amount available for State administration.

(a) Except for programs under Part C of Chapter 1 and as provided in paragraph (b) of this section, an SEA shall use funds received under section 1404(a) of the Act for the proper and efficient performance of its duties under Chapter 1.

(b) The SEA may not use more than 15 percent of the funds referred to in paragraph (a) of this section for indirect costs.

(Authority: 20 U.S.C. 2781, 2782, 2824)

[54 FR 43226, Oct. 23, 1989]

§ 201.24 Secretary's special arrangement for services (bypass).

(a) *General.* The Secretary may make a special arrangement with one or more public or nonprofit private agencies to carry out the migrant education program in a State if the Secretary determines that:

(1) An SEA is unwilling or unable to conduct an educational program for the migratory children who are eligible to be served;

(2) The arrangement would result in more efficient and economic administration of the program; or

(3) The arrangement would add substantially to the welfare or educational attainment of the migratory children who are eligible to be served.

(b) *Availability of funds.* The Secretary may use all or part of the total amount of the Chapter 1 migrant education program grant available to the affected SEA—under §§ 201.20 and 201.21—to make one or more special arrangements.

(c) *Notice to the SEA.* The Secretary does not make a special arrangement until after the affected SEA has had reasonable notice and an opportunity for a hearing.

(d) *Obligations of the operating agency.* If the Secretary makes a special arrangement for services through a public or nonprofit private agency, that operating agency shall administer its project in a manner consistent with an SEA's obligations under the regulations in this part.

(Authority: 20 U.S.C. 2782)

§ 201.25 Amount of a subgrant.

(a) In determining the amount of a subgrant to an LEA or other operating agency, the SEA shall first consider the relative needs of all operating agencies in the State that would operate migrant education projects in terms of—

(1) The numbers of currently and formerly migratory children with identified special educational needs who reside within the area served by the LEA, or other agency, in sufficient concentrations to warrant implementation of a migrant education project designed to meet those needs; and

(2) The nature, scope, and cost of the proposed projects designed to meet the needs of these currently migratory children, as described in the operating agency's approved subgrant application;

(b) Before distributing any Migrant Education Program funds to pay the supplemental costs of projects that arise because of the participation of formerly migratory children, the SEA shall ensure that the amount of each sub-grant to be awarded will be at least enough to pay the costs of projects designed to meet the unmet special educational needs of all significant concentrations of currently migratory children residing in the areas the LEA serves.

(c) Provided the amount of each subgrant satisfies the requirement of paragraph (b) of this section, the SEA shall determine the amount of a subgrant to an LEA, using procedures it considers appropriate, based on—

(1) The total number of migratory children who—

(i) Are expected to be served by the project; or

(ii) Are estimated to reside in the area served by the agency that operates the project;

(2) The nature, scope, and cost of the proposed project;

(3) The availability of funds and services from other sources; and

(4) Any other relevant criteria developed by the SEA, consistent with the service priorities in § 201.31, including the SEA's priorities concerning ages and grade levels of children to be

served, areas of the State to be served, and types of services to be provided.

(Authority: 20 U.S.C. 2781, 2782, 2831)

[54 FR 43226, Oct. 23, 1989]

Effective Date Note 1: At 54 FR 43226, October 23, 1989, § 201.25 was revised, effective after the information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. For the convenience of the user the superseded text is set forth as follows:

§ 201.25 Amount of a subgrant to an LEA.

An SEA shall determine the amount of a subgrant to an LEA or other agency based on:

(a) The number of children to be served;

(b) The nature, scope, and cost of the proposed project; and

(c) Any other relevant criteria developed by the SEA consistent with the provisions of § 201.31, including the SEA's priorities concerning ages and grade levels of children to be served, areas of the State to be served, and types of services to be provided.

Effective Date Note 2: At 55 FR 22017, May 30, 1990, § 201.25 was amended by removing "LEA" in paragraph (b) and (c) and adding in its place, the words "operating agency", effective either 45 days after publication in the Federal Register or later if Congress takes certain adjournments. The Department of Education will publish a document in the Federal Register at a later date, announcing the effective date.

(Authority: Sec. 554(a), 20 U.S.C. 3803(a); Title I, secs. 141-142, 20 U.S.C. 2761-2762)

§§ 201.26—201.29 [Reserved]

Subpart C—Project Requirements

§ 201.30 Eligibility of a child to participate.

(a) A child may not be counted under § 201.20, or be provided with Chapter 1 migrant education program services, until an SEA or its operating agency has:

(1) Determined that the child is either a currently or formerly migratory child as defined under § 201.3; and

(2) Indicated in writing how the child's eligibility was determined.

(b) In determining the eligibility of a child, an SEA and its operating agency may seek and obtain credible information from any source, including that provided by the child or his or her parent or guardian. Neither the SEA nor its operating agency is required to obtain documentary proof of either the child's eligibility or civil status from the child or his or her parent or guardian.

(c) The SEA and its operating agencies are responsible for implementing procedures that ensure the correctness of the information on which they and the MSRTS or other system rely. In doing so, the SEA shall—

(1) Ensure that the information is recorded on any certificate of eligibility, including the one developed by the Secretary, that contains the minimum information needed to determine eligibility. If the child's eligibility was determined under § 201.20(a)(3)(i) (relating to recruitment at special stopover sites), the SEA shall also record the length of time the child was expected to reside at the stopover site; and

(2) Implement a process to ensure that the completed certificate of eligibility contains accurate information in sufficient detail to explain to an independent reviewer the basis for the determination that the child is a currently or formerly migratory child under § 201.3.

(d) In the event of an audit of the State's eligibility determinations, the Secretary considers those determinations as well as statistics on the full-time equivalent (FTE) number of migratory children residing in the State to be correct if the total number of children whom the SEA has identified as migratory were correctly identified within a five percent margin of error.

(e) In implementing procedures under paragraph (c) of this section, the SEA is responsible for ensuring that no child who is found to be ineligible for the Migrant Education Program is counted as migratory. However, the SEA is not responsible for auditing its determinations for correctness within the five percent margin of error.

(Approved by the Office of Management and Budget under control number 1810-0520)

(Authority: 2781, 2782, 2831)

[50 FR 18409, Apr. 30, 1985; 50 FR 31 Aug. 5, 1985, as amended at 54 FR 432 Oct. 23, 1989; 55 FR 6982, Feb. 28, 1990]

§ 201.31 Service priorities.

(a) Children (aged 3 through 21) who have been determined to be currently migratory must be given priority over formerly migratory children in the consideration of all programs and activities that the SEA, LEA, or other operating agency offers pursuant to its approved application for Migrant Education Program funds.

(b) If, in order to provide migrant education services to preschool currently migratory children or migrant education instructional services to school-aged currently migratory children, it would be necessary to provide day care or similar services to currently migratory children aged two years of age or younger, and no funds—except Chapter 1—Migrant Education Program funds—are available for that purpose, an SEA or an operating agency may provide day care or similar services to those children as if they had a higher priority for services than do formerly migratory children.

(Authority: 20 U.S.C. 2782)

[54 FR 43226, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.31 paragraph (b) was revised, effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date. For the convenience of the user, the superseded text is set forth as follows:

§ 201.31 Service priorities.

* * * * *

(b) If, in order to provide migrant education instructional services to preschool and regular school-aged currently migratory children, it would be necessary to provide day care or similar services to children aged two years or younger who are currently migratory children (or migrant education preschool services to currently migratory children three years of age or over who are not enrolled in instructional programs), and no funds—except Chapter 1—Migrant Education Program funds—are available for that purpose, an SEA or an operating agency may provide day care services to those children as if those children had a higher priority than formerly migratory children.

§ 201.32 Annual needs assessment.

(a) An SEA and any operating agency that receives Chapter 1 migrant education funds shall design and improve their migrant education programs and projects through use of an annual assessment of educational needs. Subject to the special rules for preschool projects in paragraph (e) of this section, in implementing the annual assessment of educational needs, the SEA or operating agency shall on the basis of the best available information—

(1) Identify migrant children or, if this is not possible, the specific characteristics of the children who are expected to reside in the area served by the SEA or operating agency and who are eligible to be counted as migratory children under § 201.20(a);

(2) Identify the general instructional areas and grade levels in which the program or project will focus;

(3) Establish educational criteria that—

(i) Are consistent with the requirements of paragraphs (b) and (c) of this section; and

(ii) For each grade level and instructional area, will be used to select migratory children to participate in the program or project;

(4) To the extent possible, uniformly apply the criteria required in paragraph (a)(3) of this section to particular grade levels;

(5) Select for services those migratory children, consistent with the service priorities in § 201.31, who have the greatest need for Migrant Education Program services; and

(6) Determine—

(i) The special educational needs of migratory children expected to participate with sufficient specificity to permit concentration on those needs; and

(ii) The resources, such as personnel, instructional materials, and library resources, necessary to meet those special educational needs.

(b) In formulating and applying the educational criteria pursuant to paragraphs (a) (3) and (4) of this section, the SEA and operating agency—

(1) Shall consider the differing needs, if any, among—

(i) Currently migratory children based on the effect of migrations on the continuity of their education; and

(ii) Formerly migratory children based on the effect of former migrations on their educational development; and

(2) With regard to currently migratory students, may conduct its annual needs assessment on the basis of the latest available information relevant to the needs of the children expected

to be present at periods of peak enrollment.

(c) The educational criteria referred to in paragraph (a)(3) of this section must be—

(1) For currently migratory children, the most appropriate educationally related objective criteria including, if reasonably possible, the results of written or oral tests; and

(2) For formerly migratory children, educationally related objective criteria, including the results of written or oral tests.

(d) The SEA or operating agency may skip currently or formerly migratory children in greatest need of special assistance if their special educational needs are being met with services provided under other Federal, State, or local programs.

(e) Only paragraphs (a) (1), (2), and (5), and (d) of this section apply to projects the SEA or operating agency establishes to meet the preschool educational needs of migratory children.

(Approved by the Office of Management and Budget under control number 1810-0519)

(Authority: 20 U.S.C. 2724, 2782)

[54 FR 43226, Oct. 23, 1989, as amended at 55 FR 6982, Feb. 28, 1990; 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.32 paragraph (a) was amended by removing "paragraph (c)" and adding, in its place, "paragraph (e)", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.33 [Reserved]

§ 201.34 Coordination with other migrant programs and projects.

An SEA and its operating agencies shall plan and operate the activities described in their applications in coordination with migrant programs and projects of other groups or agencies that provide services to migrants in the area served by the SEA and its operating agencies, including migrant and seasonal farmworker projects administered under section 418A of the Higher Education Act, section 402 of the Job Training Partnership Act, the Education of the Handicapped Act, the Community Services Block Grant Act, the Head Start Program, the Migrant Health Program, and all appropriate programs of the Departments of Education, Labor, and Agriculture.

(Authority: 20 U.S.C. 2782)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43227, Oct. 23, 1989]

§ 201.35 Requirements for parent involvement.

(a) *General.* State and local agencies that receive Chapter 1—Migrant Education Program funds shall design and implement their programs and projects in consultation with the parents of the children to be served, and shall carry out programs, activities, and procedures for the involvement of parents in their migrant education programs and projects.

(b) *Parent advisory councils.* (1) State and local agencies implementing programs extending for the duration of the school year shall establish a parent advisory council. The council must have a majority of members who are parents (or guardians) of children to be served by the migrant education program or projects and, if feasible, who are elected by the parents of children to be served;

(2) The SEA shall establish procedures to ensure that—

(i) The SEA and the State's operating agencies appropriately consult with, and solicit information from, councils representative of parents of migratory children in the planning, operation, and evaluation of a program or local project; and

(ii) Compliance with this provision at the State and local levels is documented annually in the State or local agency's application for funds or updating information.

(c) *Parental involvement.* Each SEA and operating agency shall, in a manner consistent with paragraphs (a) through (c) and (e) of 34 CFR 200.34, involve parents in meaningful consultation in the design and implementation of the programs and projects.

(Authority: 20 U.S.C. 2726, 2782)

[54 FR 43227, Oct. 23, 1989]

EFFECTIVE DATE NOTE: At 54 FR 43227, October 23, 1989, § 201.35 was revised, effective after the information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. For the convenience of the user the superseded text is set forth as follows:

§ 201.35 Requirements for parent involvement.

(a) *General.* An agency that receives Chapter 1 funds shall design and implement its Chapter 1 program or projects in consultation with teachers of children being served and in consultation with the parents of the children being served.

(b) *Requirements for an operating agency advisory council.* An SEA shall require each operating agency to:

(1) Establish and consult with a parent advisory council; and

(2) Solicit actively parental involvement in the planning, operation, and evaluation of its projects.

(c) *Requirements for the State advisory council.* An SEA shall:

(1) Establish and consult with a parent advisory council; and

(2) Solicit actively parental involvement in the planning, operation, and evaluation of the State's migrant education program.

(d) *Advisory council procedures.* The SEA is responsible for ensuring that appropriate procedures are devised and made available to the State's migrant parents for establishment of and consultation with State and local parent advisory councils. Those procedures must be consistent with the requirements of section 125(a) of Title I.

(Authority: Sec. 554(a), 20 U.S.C. 3803(a); sec. 556(b)(3), 20 U.S.C. 3805(b)(3); Title I, sec. 142(a)(4), 20 U.S.C. 2762(a)(4))

§ 201.36 General program requirements.

In developing and implementing its migrant education program and projects, the SEA shall ensure that—

(a) (1) The children selected for services are those with the greatest need for special assistance—

(i) Consistent with the service priorities in § 201.31; and

(ii) As determined, to the maximum extent possible, using the educational criteria required by § 201.32 (annual needs assessment); and

(2) The special educational needs of these children are sufficiently specified to permit the SEA to concentrate on meeting those needs;

(b) The size, scope, and quality of the program and projects offered are sufficient to give reasonable promise of substantial progress toward meeting the special educational needs of the migrant children being served;

(c) The results of evaluations are used to improve the provision of services to eligible migrant children by either—

(1) Disapproving an application to continue a project in a succeeding year if the project is not making substantial progress toward meeting the educational goals of the project and this part; or

(2) Approving changes in the project that will enable the SEA to meet those goals;

(d) Services are provided to all significant concentrations of eligible migratory children enrolled in private schools, consistent with the service priorities in § 201.31, in accordance with the basic objectives of section 1017 of the Act;

(e) The SEA allocates time and resources for frequent and regular coordination of the curriculum under the migrant education program with the regular instructional program; and

(f) In the case of children participating in the migrant education program who are also of limited English proficiency or are handicapped—

(1) The SEA provides maximum coordination between services provided under the migrant education program and other services that are provided to address children's handicapping conditions or limited English proficiency; and

(2) The SEA's coordination activities are designed to increase program effectiveness, eliminate duplication, and reduce fragmentation of services for migratory children.

(Approved by the Office of Management and Budget under control number 1810-0519)

(Authority: 20 U.S.C. 2722, 2724, 2729, 2782, 2831)

[54 FR 43227, Oct. 23, 1989, as amended at 55 FR 6982, Feb. 28, 1990]

§§ 201.37—201.39 [Reserved]

Subpart D—Administrative and Fiscal Requirements

Source: 54 FR 43228, Oct. 23, 1989, unless otherwise noted.

§ 201.40 Prohibition against using Chapter 1 funds to provide general aid.

An LEA or other operating agency that has received assistance from an SEA may use Chapter 1 funds provided under this part only for projects that are designed and implemented to meet the special educational needs of migratory children who are identified and selected for services in accordance with the provisions in this part.

(Authority: 20 U.S.C. 2781, 2782)

§ 201.41 Maintenance of effort.

(a) (1) *Basic standard.* Before an SEA may provide an LEA a subgrant for the operation of a migrant education project, the SEA must find either that the LEA's combined fiscal effort per student or its aggregate expenditures of State and local funds with respect to the provision of free public education for the preceding fiscal year was not less than 90 percent of the LEA's combined fiscal effort per student or the aggregate expenditures of State and local funds for the second preceding fiscal year.

(2) *Meaning of preceding fiscal year.* For purposes of determining maintenance of effort, the "preceding fiscal year" is the Federal fiscal year, or 12-month period most commonly used in a State for official reporting purposes, prior to the beginning of the Federal fiscal year in which funds are available.

Example: For funds first made available on July 1, 1989, if a State is using the Federal fiscal year, "the preceding fiscal year" is the Federal fiscal year 1988 (which began on October 1, 1987) and the "second preceding fiscal year" is fiscal year 1987 (which began on October 1, 1986). If a State is using a fiscal year that begins on July 1, 1989, the "preceding fiscal year" is the 12-month period ending on June 30, 1988 and the "second preceding fiscal year" is the 12-month period ending on June 30, 1987.

(3) *Expenditures*—(i) *To be considered.* In determining an LEA's compliance with the maintenance of effort requirement, the SEA shall consider the LEA's expenditures from State and local funds for free public education. These include expenditures for administration, instruction, attendance, health services, pupil transportation, plant operation and maintenance, fixed charges, and net expenditures to cover deficits for food services and student body activities.

(ii) *Not to be considered.* The SEA may not consider the following expenditures in determining the LEA's compliance with the maintenance of effort requirement:

(A) Any expenditures for community services, capital outlay, or debt service.

(B) Any expenditures made from funds provided under Chapter 1 and Chapter 2 of Title I of the Act or Chapter 1 and Chapter 2 of the ECIA.

(b) *Failure to maintain effort.* (1) If an LEA fails to maintain effort as provided in paragraph (a) of this section, and a waiver under § 201.42 is not granted, the SEA shall reduce the LEA's subgrant with respect to the amount allowed for its indirect costs under 34 CFR 76.563 by 50 percent.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year in which the LEA failed to maintain effort, the SEA shall consider the LEA's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the LEA) for the third preceding fiscal year.

Example: In Federal fiscal year 1990, an LEA fails to maintain effort because its fiscal effort in the preceding fiscal year (1988) (see example in paragraph (a)(2) of this section) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987). In assessing whether the LEA maintained effort during the next fiscal year (1991), the SEA may consider the LEA's fiscal effort in the second preceding fiscal year (1988) (the year that caused the LEA's failure to maintain effort) to be no less than 90 percent of the LEA's expenditure in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728, 2782, 2831)

§ 201.42 Waiver of the maintenance of effort requirement.

(a) (1) An SEA may waive, for one fiscal year only, the maintenance of effort requirement applying to an LEA in § 201.41, if the SEA determines that a waiver would be equitable due to exceptional or uncontrolled circumstances. These circumstances include, but are not limited to, the following:

(i) A natural disaster.

(ii) A precipitous and unforeseen decline in the financial resources of the LEA.

(2) An SEA may not consider tax initiatives or referenda to be exceptional or uncontrollable circumstances.

(b) (1) If the SEA grants a waiver under paragraph (a) of this section, the SEA may not reduce the amount of migrant education funds the LEA is otherwise entitled to receive.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year for which the waiver was granted, the SEA shall consider the LEA's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the LEA) for the third preceding fiscal year.

EXAMPLE: In fiscal year 1990, an LEA secures a waiver because its fiscal effort in the preceding fiscal year (1988) (see example in § 201.41 (a)(2)) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987) due to exceptional or uncontrollable circumstances. In assessing whether the LEA maintained effort during the next fiscal year (1991), the SEA may consider the LEA's expenditures for the second preceding fiscal year (1988) (the year for which the LEA needed a waiver) to be no less than 90 percent of the LEA's expenditures in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728, 2782, 2831)

§ 201.43 Supplement, not supplant.

(a) Except as provided in § 201.45(a)(1), an agency that receives migrant education funds available under this part may use those funds only to supplement and, to the extent practicable, increase the level of non-Federal funds that would, in the absence of migrant education funds, be made available for the education of pupils participating in migrant education projects, and in no case may migrant education funds be used to supplant those non-Federal funds.

(b) To meet the requirement in paragraph (a) of this section, an operating agency is not required to provide services under this part through the use of a particular instructional method or in a particular instructional setting.

(Authority 20 U.S.C. 2728, 2782, 2831)

[54 FR 43228, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.43 paragraph (b) was amended by removing "LEA" and adding, in its place, the words "operating agency", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.44 Comparability.

(a) Except as provided in paragraph (b) of this section and § 201.45, an operating agency may receive Migrant Education Program funds only if the operating agency uses State and local funds to provide services to students receiving Migrant Education Program services that, taken as a whole, are at least comparable to services being provided to students, enrolled in the same grade levels of all of the operating agency's schools, which are not receiving Migrant Education Program-funded services.

(b) (1) An operating agency is considered to have met the comparability requirements in paragraph (a) of this section, if it either—

(i) Files with the SEA a written assurance that it has established and implemented—

(A) A district-wide salary schedule;

(B) A policy to ensure equivalence among schools in teachers, administrators, and auxiliary personnel; and

(C) A policy to ensure equivalence among schools in the provision of curriculum materials and instructional supplies; or

(ii) Establishes and implements other measures for determining compliance as the SEA may approve.

(2) In determining compliance with paragraph (a) of this section, an operating agency does not need to consider unpredictable changes in student enrollment or personnel assignments that occur after the beginning of a school year.

(c) (1) An operating agency shall develop written procedures to ensure compliance with paragraph (a) of this section.

(2) The written procedures ensuring compliance with paragraph (a) of this section must include a process for demonstrating that State and local funds are used to provide services to students receiving Migrant Education Program services that are at least comparable to the services provided to students in the same grades who are not receiving Migrant Education Program funds.

(d) An operating agency shall maintain annual records documenting compliance with paragraph (a) of this section.

(e) In accordance with the rulemaking requirements in § 201.46, an SEA may establish standards to ensure that an operating agency's policies under paragraph (c) of this section result in the provision of equivalent staffing, materials, and supplies among the schools of the operating agency.

(f) (1) The SEA shall monitor each LEA's compliance with the comparability requirements.

(2) If an operating agency is found not to be in compliance with the comparability requirements, the amount to be withheld or repaid is the amount or percentage by which the operating agency failed to comply with the measures established under paragraph (b) of this section.

(Authority: 20 U.S.C. 2728(c), (d), 2782, 2831)

[54 FR 43228, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE 1: At 54 FR 43228, October 23, 1989, § 201.44 was added, effective after the information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980.

EFFECTIVE DATE NOTE 2: At 55 FR 22017, May 30, 1990, § 201.44 was amended by removing "LEA" wherever it appears and adding, in its place, the words "operating agency", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.45 Excluding special State and local funds from supplement, not supplant and comparability determinations.

(a) *General rule.* (1) For the purpose of determining compliance with the supplement, not supplant requirement in § 201.43 and the comparability requirement in § 201.44, an operating agency may exclude State and local funds spent in carrying out the following types of programs:

(i) Special State programs designed to meet the special educational needs of migratory children, including compensatory education for migratory children, that the Secretary has determined in advance under paragraph (b) of this section meet the requirements in section 1018(d)(1)(8) of the Act.

(ii) Special local programs designed to meet the special educational needs of migratory children, including compensatory education for migratory children, that the SEA has determined in advance under paragraph (c) of this section meet the requirements in section 1018(d)(1)(B) of the Act.

(2) For the purpose of determining compliance with the comparability requirements in § 201.44 only, an operating agency may also exclude State and local funds spent in carrying out the following types of programs:

(i) Bilingual education for children of limited English proficiency.

(ii) Special education for handicapped children.

(iii) State phase-in programs that the Secretary has determined in advance under paragraph (b) of this section meet the requirements in section 1018(d)(2)(B) of the Act.

(b) *Secretarial determination regarding State programs.* (1) In order for an operating agency to exclude State and local funds spent on State programs under paragraphs (a)(1)(i) and (a)(2)(iii) of this section, an SEA shall request the Secretary to make an advance determination of whether—

(i) A special State program under paragraph (a)(1) of this section meets the requirements in section 1018(d)(1)(B) of the Act; and

(ii) A State phase-in program under paragraph (a)(2)(iii) of this section meets the requirements in section 1018(d)(2)(B) of the Act.

(2) Before making the determination, the Secretary requires the SEA to submit copies of the State law and implementing rules, regulations, orders, guidelines, and interpretations that the Secretary may need to make the determination.

(3) The Secretary makes the determination in writing and includes the reasons for the determination.

(4) If there is any material change in the pertinent State law affecting the program, the SEA shall submit those changes to the Secretary.

(c) *SEA determination regarding local programs.* (1) In order for an operating agency to exclude State and local funds spent on a special local program under paragraph (a)(1)(ii) of this section, the operating agency shall request the SEA to make an advance determination of whether that program meets the requirements in section 1018(d)(1)(B) of the Act.

(2) Before making a determination, the SEA shall require the operating agency to submit copies of the State law and implementing rules, regulations, orders, guidelines, and interpretations that the SEA may need to make the determination.

(3) The SEA shall make the determination in writing and include the reasons for its determination.

(4) If there is any material change in the pertinent local requirements affecting the program, the operating agency shall submit those changes to the SEA.

(Authority: 20 U.S.C. 2728 (b), (c), (d), 2782)

[54 FR 43228, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, § 201.45 was amended by removing "LEA" wherever it appears and adding, in its place, the words "operating agency", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.46 State rulemaking and other SEA responsibilities.

(a) An SEA is responsible for ensuring that the agencies that receive Chapter 1—Migrant Education Program funds in the State comply with all statutory and regulatory provisions applicable to Chapter 1.

(b)(1) Except as provided in paragraph (c) of this section, Chapter 1 does not preempt, prohibit, or encourage State rules, regulations, or policies issued pursuant to State law.

(2) If a State issues rules, regulations, or policies, they must be consistent with the provisions of the following:

(i) The Chapter 1 statute.

(ii) The regulations in this part.

(iii) Other applicable Federal statutes and regulations.

(iv) The SEA application approved under § 201.13.

(c)(1) Unless needed to implement SEA responsibilities in its approved State application or in the Chapter 1—Migrant Education Program statute or regulations, a State may not issue rules, regulations, or policies that limit LEAs' decisions affecting funds received under this part regarding—

(i) Grade levels to be served;

(ii) Basic skill areas to be addressed;

(iii) Instructional settings, materials, or teaching techniques to be used;

(iv) Instructional staff to be employed, as long as the staff meets State certification and licensing requirements for education personnel; or

(v) Other essential support services.

(2) For purposes of this section, decisions concerning the planning, implementation, and evaluation of migrant education programs and projects conducted at the local operating agency level are not "LEA decisions" unless the SEA determines that the LEA or other operating agency has authority to make these decisions.

(d) The imposition of any State rule or policy relating to the administration and operation of the Chapter 1—Migrant Education Program, including those based on State interpretation of any Federal law, regulation, or guideline, must be identified as a State-imposed requirement.

(e)(1)(i) Except as provided in paragraphs (e)(1)(ii) and (e)(1)(iii) of this section, if a State issues major rules or regulations relating to the administration or operation of programs funded under this part, the State shall convene a State committee of practitioners to review before publishing any major proposed or final rule or regulation.

(ii) In an emergency situation in which a major rule or regulation must be issued within a very limited time to assist agencies with the operation of programs under this part, the State—

(A) May issue the regulation without consulting the committee of practitioners; but

(B) Shall immediately thereafter convene the State committee of practitioners to review the emergency rule or regulation prior to issuance in final form.

(iii) The State shall ensure that the committee of practitioners reviews non-major rules or regulations before publication.

(2) If a State does not issue rules or regulations relating to the administration or operation of programs under this part but issues policies that the SEA and local operating agencies are required to follow, the State must comply with the requirements in this section for issuing rules and regulations.

(3)(i) The committee of practitioners must include—

(A) Administrators;

(B) Teachers;

(C) Parents;

(D) Member of local boards of education; and

(E) Representatives of private school children; and

(ii) A majority of the committee must be representatives of LEAs or other operating agencies.

(iii) SEAs are encouraged to request from appropriate organizations recommendations for membership on the committee.

(Authority: 20 U.S.C. 2782, 2831, 2851)

§ 201.47 Complaint procedures for an SEA.

(a) An SEA shall adopt written procedures for—

(1) Receiving and resolving any complaint that the SEA or an operating agency is violating a Federal statute or regulations that apply to programs under this part;

(2) Reviewing an appeal from a decision of an operating agency with respect to a complaint; and

(3) Conducting an independent on-site investigation of a complaint if the SEA determines that an on-site investigation is necessary.

(b) An SEA shall include in its complaint procedures—

(1) A time limit of 60 calendar days after the SEA receives a complaint—

(i) If necessary, to carry out an independent on-site investigation; and

(ii) To resolve the complaint;

(2) An extension of the time limit under paragraph (b)(1) of this section only if exceptional circumstances exist with respect to a particular complaint; and

(3) The right to request the Secretary to review the final decision of the SEA.

(c) An organization or individual may file a written signed complaint with an SEA. The complaint must include—

(1) A statement that the SEA or an operating agency has violated a requirement of a Federal statute or regulations that apply to the Chapter 1—Migrant Education Program; and

(2) The facts on which the statement is based.

(Authority: 20 U.S.C. 2831(a))

[54 FR 43228, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE 1: At 54 FR 43228, October 23, 1989, § 201.47 was added, effective after the information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980.

EFFECTIVE DATE NOTE 2: At 55 FR 22017, May 30, 1990, § 201.47 was amended by removing "LEA" wherever it appears and adding, in its place, the words "operating agency", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.48 Allowable costs using program funds.

(a) To administer its migrant education program for migratory children, an SEA may use the funds made available for the State migrant education program under § 201.21 only to perform those functions that are unique to the migrant education program or that are the same or similar to the functions performed by LEAs in the State under 34 CFR part 200.

(b) These functions include, but are not limited—

(1) Statewide identification and recruitment of eligible migratory children;

(2) Interstate and intrastate coordination of the State migrant education program and its local projects with other State programs and local projects;

(3) Coordinating project level activities with other public and private agencies;

(4) Implementing the migrant student record transfer system;

(5) Processing reports that are submitted by the operating agencies to the SEA:

(6) Maintaining inventories of property acquired with Migrant Education Program funds;

(7) Negotiating awarding of contracts; and

(8) Evaluating activities of the State migrant education program, other than the design of evaluation report forms and final preparation of the SEA's evaluation report to the Secretary.

(Authority: 20 U.S.C. 2781, 2782, 2831)

§ 201.49 Persons to be assigned non-Chapter 1 duties.

(a) An operating agency may assign public school personnel paid entirely with migrant education funds to limited supervisory duties that may provide some benefit to children not participating in the migrant education project if—

(1) Similarly situated personnel at the same school site, who are not paid with Chapter 1—Migrant Education Program funds, are assigned these duties; and

(2) The time spent by Chapter 1 personnel on these duties does not exceed the least of the following:

(i) The proportion of total work time that similarly situated non Chapter 1 personnel at the same school site spend performing these duties.

(ii) One period per day.

(iii) Sixty minutes per day.

(b) The amount of time referred to in paragraph (a)(2) of this section may be calculated on a daily, weekly, monthly, or annual basis.

(c) The duties in paragraph (a) of this section need not be limited to classroom instruction, but may include, but are not limited to, the following:

(1) Supervision of halls, playgrounds, lunchrooms, study halls, bus loading and unloading, and homerooms.

(2) Participation as a member of a school or district curriculum committee.

(3) Participation in the selection of regular curriculum materials and supplies.

(Authority: 20 U.S.C. 2853)

[54 FR 43228, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.49 paragraph (a) was amended by removing "LEA" and adding, in its place, the words "operating agency", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.50 Prohibition against considering payments under the Migrant Education Program in determining State aid.

A State may not take into consideration payments under the Migrant Education Program in determining—

(a) The eligibility of an LEA for State aid; or

(b) The amount of State aid to be paid to an LEA for free public education.

(Authority: 20 U.S.C. 2854)

Subpart E—Evaluation

Source: 54 FR 43230, Oct. 23, 1989, unless otherwise noted.

§ 201.51 Evaluation and demographic reports.

(a) *Operating agency evaluations.* (1) An operating agency shall evaluate, at least once every three years, the overall progress, including the educational progress, of migratory children who participate in its Chapter 1 migrant education projects, in terms of basic and more advanced skills that all children are expected to master. Progress must be measured—

(i) Against the desired outcomes described in the operating agency's application; and

(ii) Except for Chapter 1 migratory children in preschool, kindergarten, and first grade, in terms of student achievement in accordance with the national standards in § 201.53.

(2) (i) The operating agency shall determine whether improved performance of the Chapter 1 formerly migratory children, participating in a full school year program at least two years, is sustained over a period of more than 12 months.

(ii) To make this determination, an operating agency shall assess performance of the same children for at least two consecutive 12-month periods, provided these children continue to be enrolled in the schools of the operating agency.

Example: An operating agency provides Chapter 1 migrant education services during the 1989-90 school year. The operating agency measures the gains made by participating children on a spring-spring testing cycle (spring 1989, 1990). To determine whether improved performance is sustained over the period of more than 12 months, the operating agency measures the performance again in the spring of 1991.

(3) The operating agency shall report its evaluation results to the SEA at least once during each three-year application cycle.

(b) *SEA evaluations.* (1) An SEA shall evaluate, at least every two years, the Chapter 1—Migrant Education Program in the State on the basis of the local evaluations conducted under paragraph (a) of this section and sections 1107 and 1202(a)(6) of the Act.

(2) The SEA shall ensure that its biennial evaluation report is representative of the statewide program.

(3) The SEA shall inform its operating agencies, in advance, of the specific data that will be needed and how the data may be collected.

(4) The SEA shall—

(i) By a date established by the Secretary, submit its evaluation to the Secretary; and

(ii) Make public the results of the evaluation.

(5) The SEA may require the operating agencies to evaluate the effect of the Chapter 1 migrant education projects on the children's achievement in basic and more advanced skills within the regular program, including, but not limited to, writing, science, history, or other subjects.

(c) *SEA's annual performance report.* (1) An SEA shall annually—

(i) Collect the evaluation and demographic data as required by section 1019 of the Act and specified by the Secretary for the SEA's annual performance report; and

(ii) Submit those data to the Secretary in that report.

(2) An operating agency shall provide to the SEA any data needed by the SEA to complete its annual report.

(Approved by the Office of Management and Budget under control number 1810-0519)

(Authority: 20 U.S.C. 2722, 2729, 2781, 2782, 2835, 2852)

[54 FR 43230, Oct. 23, 1989, as amended at 55 FR 6982, Feb. 28, 1990; 55 FR 22017, May 30, 1990]

Effective Date Note: At 55 FR 22017, May 30, 1990, in § 201.51 was amended by removing "LEA" wherever it appears and adding, in its place, the words "operating agency", effective either 45 days after publication in the Federal Register or later if Congress takes certain adjournments. The Department of Education will publish a document in the Federal Register at a later date, announcing the effective date.

§ 201.52 Evaluation information to be collected.

(a) In assessing their programs and projects, the SEAs and operating agencies shall conduct evaluations that assess the overall progress of participating migratory children in grades 2 through 12, including educational progress, in terms of instructional services and support services.

(b) The evaluation design for the regular school year instructional project must include—

(1) Objective measures of the educational progress of project participants (including educational achievement in basic skills) as measured, if possible, over a 12-month testing interval through the use of appropriate forms and levels of national or State normed achievement tests. If this is not possible, the SEA or operating agency may use other acceptable measures of educational progress of migratory children, such as changes in attendance patterns, dropout rates, and other objectively applied indicators of student achievement compared to the performance of an appropriate non-project comparison group, as defined in § 201.54; and

(2) A measure for determining whether, for formerly migratory children who have been served under this part in a full school year program for at least two years, improved performance is sustained for at least one additional year.

(c) The evaluation design for the summer school instructional project must include—

(1) Objective measures of the educational progress of project participants (including educational achievement in basic skills) over the project performance period; and

(2) To the extent possible, a means of comparing project outcomes to those of an appropriate non-project comparison group.

(d) During either the regular or summer terms, the evaluation design for any support-service components must include—

(1) Measures of the effects of the project on participants that are consistent with the defined support services objectives. (For example, changes in student attendance rates may be an appropriate measure of the effect of guidance and counseling services.); and

(2) If possible, a means of comparing project outcomes to the performance of an appropriate non-project comparison group.

(Approved by the Office of Management and Budget under control number 1810-0519)

(Authority: 20 U.S.C. 2729, 2782, 2831, 2835)

[54 FR 43230, Oct. 23, 1989, as amended at 55 FR 6982, Feb. 28, 1990]

§ 201.53 General technical standards for evaluation.

SEAs and local operating agencies shall comply with the following technical standards in designing and implementing procedures for the evaluation of Chapter 1 migrant education projects:

(a) *Representativeness of evaluation findings.* The evaluation results must be computed so that the findings apply to the persons served in projects under the program. This may be accomplished by including in the evaluation either all or a representative sample of persons, schools, agencies, or projects.

(b) *Reliability and validity of evaluation instruments.* The evaluation instruments used must consistently and accurately measure progress toward accomplishing the objectives of the project, and must be appropriate considering factors such as the age, grade, mobility, language, degree of language fluency, and background of the persons served by the project.

(c) *Soundness of evaluation procedures.* The evaluation procedures must minimize error by providing for proper administration of the evaluation instruments, accurate scoring and transcription of results, and the use of analysis and reporting procedures that are appropriate for the data obtained from the evaluation.

(d) *Valid assessment of project outcomes.* The evaluation procedures must provide for accurate and objective measurement of the progress made by project participants towards defined project objectives.

(Authority: 20 U.S.C. 2729, 2782, 2831, 2835)

§ 201.54 Non-project comparison groups.

To fulfill the requirement for a non-project comparison group, appropriate comparison groups consist of persons who are as similar as possible in age, grade, language, degree of language fluency, previous achievement level, and other relevant background variables.

(Authority: 20 U.S.C. 2729, 2782, 2831, 2835)

[54 FR 43228, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.54 was amended by removing paragraph (b) and by removing the paragraph designation "(a)", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date. For the convenience of the user the superseded text reads as follows:

§ 201.54 Non-project comparison groups.

(b) To fulfill the requirements of § 201.52(b) and (c), SEAs and operating agencies, to the extent possible, must use appropriate forms and levels of national or State normed achievement tests.

§ 201.55 Submission of sampling plans.

(a) If an SEA wishes to use sampling in its evaluation of programs conducted under this part, the SEA shall submit, for prior approval by the Secretary, a proposed sampling plan designed to ensure that evaluations will be on a representative sample of its operating agencies in any school year.

(b) The Secrerary approves a sampling plan that will provide reliable and representative data under this subpart.

(c) (1) The SEA shall review its sampling plan at least once every three years.

(2) If, based on this review or other circumstances, the sampling plan requires changes, the SEA shall request reapproval of the plan by the Secretary.

(Authority: 20 U.S.C. 2835)

[54 FR 43230, Oct. 23, 1989]

EFFECTIVE DATE NOTE: At 54 FR 43230, October 23, 1989, § 201.55, was added, effective after the information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980.

§ 201.56 Use of evaluation results for program improvement.

SEAs and operating agencies must ensure that the results of their evaluations are used to improve services provided to the children in their Chapter 1 migrant education programs and projects.

(Approved by the Office of Management and Budget under control number 1810-0519)

(Authority: 20 U.S.C. 20 U.S.C. 2729, 2782)

[54 FR 43230, Oct. 23, 1989, as amended at 55 FR 6982, Feb. 28, 1990]

PART 203—CHAPTER 1 PROGRAM FOR NEGLECTED OR DELINQUENT CHILDREN

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AUTHORITY: 20 U.S.C. 1232(b) (2), (5), 2721(a), 2724(b), 2728 (a), (b), (d), 2729(b), 2801-2804, 2811-2812, 2824 (a), (b), 2831(a), 2835 (a), (d), 2838 (a), (b), (c), 2851, 2853, 2891, unless otherwise noted.

SOURCE: 54 FR 30197, July 18, 1989, unless otherwise noted.

Subpart A—General

§ 203.1 What is the Chapter 1 Program for Neglected or Delinquent Children?

Under the Chapter 1 Program for Neglected or Delinquent Children, the Secretary provides Federal financial assistance for projects designed to meet the special educational needs of neglected or delinquent children—

(a) In institutions for neglected children;

(b) In institutions for delinquent children;

(c) Attending community day programs for neglected or delinquent children; and

(d) In adult correctional institutions.

(Authority: 20 U.S.C. 2802(a))

§ 203.2 Who is eligible for a grant?

The Secretary provides funds under this part to State educational agencies (SEAs) for State agencies directly responsible for providing free public education for children referred to in § 203.1.

(Authority: 20 U.S.C. 2801(a))

§ 203.3 Who is eligible for a subgrant?

(a) A State agency that is responsible for providing free public education for children in institutions for neglected or delinquent children, children attending community day programs for neglected or delinquent children, or children in adult correctional institutions is eligible to receive a subgrant under this part.

(b) The SEA shall annually notify each eligible State agency of the amount of funds the State agency is eligible to receive under the Chapter 1 Neglected or Delinquent Program.

(Authority: 20 U.S.C. 2801 (a), (b))

§ 203.4 What kind of activities may be assisted?

Under the Chapter 1 Neglected or Delinquent Program, the Secretary makes payments to SEAs to assist State agencies in conducting—

(a) Programs and projects that are designed to meet the special educational needs of children in institutions for neglected or delinquent children, children attending community day programs for neglected or delinquent children, and children in adult correctional institutions; and

(b) Projects that facilitate the transition of children from State institutions for neglected or delinquent children into programs operated by local educational agencies (LEAs).

(Authority: 20 U.S.C. 2802(a), 2803(a))

§ 203.5 What regulations apply?

The following regulations apply to the Chapter 1 Neglected or Delinquent Program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR Part 76 (State-Administered Programs) as follows:

(i) Subpart A (General), except for § 76.3 (ED general grant regulations apply to these programs).

(ii) Sections 76.125 through 76.137 (Consolidated Grant Applications for Insular Areas).

(iii) Section 76.401 (Disapproval of an application—opportunity for a hearing).

(iv) Subpart F (What Conditions Must Be Met by the State and Its Subgrantees?), except for the following sections:

(A) Sections 76.580-76.581 (Coordination).

(B) Sections 76.650 through 76.662 (Participation of Students Enrolled in Private Schools).

(C) Section 76.684 (Day care services).

(D) Section 76.690 (Energy conservation awareness).

(v) Subpart G (What Are the Administrative Responsibilities of the State and Its Subgrantees?), except for the following sections:

(A) Sections 76.770 through 76.772 (State Administrative Responsibilities).

(B) Section 76.780 (A State shall adopt complaint procedures).

(C) Section 76.781 (Minimum complaint procedures).

(D) Section 76.782 (An organization or individual may file a complaint).

(vi) Subpart H (What Procedures Does the Secretary Use to Get Compliance?).

(2) 34 CFR Part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR Part 78 (Education Appeal Board).

(4) 34 CFR Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), unless a State formally adopts its own written fiscal and administrative requirements for expending and accounting for all funds received by SEAs and State agencies under this part. These requirements must be available for Federal inspection and must—

(i) Be sufficiently specific to ensure that funds received under this part are used in compliance with all applicable statutory and regulatory provisions;

(ii) Ensure that funds received under this part are only spent for reasonable and necessary costs of operating programs under this part; and

(iii) Ensure that funds received under this part are not used for general expenses required to carry out other responsibilities of State or local governments.

(5) 34 CFR Part 81 (General Education Provisions Act—Enforcement).

(6) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(b) The regulations in this Part 203.

(Authority: 20 U.S.C. 2831(a))

[54 FR 30197, July 18, 1989, as amended at 54 FR 43232, Oct. 23, 1989]

§ 203.6 What definitions apply?

(a) *Definitions in the Act.* The following terms used in this part are defined in section 1471 of the Act:

Average daily attendance
Average per pupil expenditure
Construction
Current expenditures
Equipment
Free public education
Local educational agency
Parent
Pupil services
Pupil services personnel
Secretary
State
State educational agency

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

GEPA
Grant
Nonprofit
Private
Project
Supplies

(c) *Other definitions.* The following definitions also apply to this part:

Act means Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965, as amended.

Adult correctional institution means a facility in which persons are confined as a result of a conviction of a criminal offense, including persons under 21 years of age.

Children means—

(1) Persons up to age 21 who are entitled to a free public education not above grade 12; and

(2) Preschool children.

Community day program means, as determined by the SEA, a regular program of instruction provided by a State agency at a community day school operated specifically for neglected or delinquent children.

ECIA means the Education Consolidation and Improvement Act of 1981.

Fiscal year means the Federal fiscal year—a period beginning on October 1 and ending the following September 30—or another 12-month period normally used by the SEA for recordkeeping.

Institution means either an institution for neglected children or an institution for delinquent children, or an adult correctional institution.

Institution for delinquent children means, as determined by the SEA, a public or private residential facility that is operated for the care of children who—

(1) Have been determined to be delinquent or in need of supervision; and

(2) Have had an average length of stay in the institution of at least 30 days.

Institution for neglected children means, as determined by the SEA, a public or private residential facility, other than a foster home, that is operated for the care of children who—

(1) Have been committed to the institution or voluntarily placed in the institution under applicable State law because of abandonment, neglect, or death of the parents or guardians; and

(2) Have had an average length of stay in the institution of at least 30 days.

Regular program of instruction means an educational program (not beyond grade 12) in an institution or a community day program for neglected or delinquent children that consists of classroom instruction in basic school subjects such as reading, mathematics, and vocationally oriented subjects, and that is supported by non-Federal funds. Neither the manufacture of goods within the institution nor activities related to institutional maintenance are considered classroom instruction.

State agency means an agency of State government directly responsible for the free public education of children in institutions for neglected or delinquent children or in adult correctional institutions, or in community day programs for neglected or delinquent children. Although the term generally refers to an agency other than an SEA, the term includes an SEA that receives a specific State appropriation for the education of neglected or delinquent children but transfers the funds to another agency that has responsibility for providing the educational services. The educational services may be provided in schools operated by the SEA or the State agency or in schools under contract or other arrangement with the SEA or the State agency.

(Authority: 20 U.S.C. 2831(a), 2891)

§§ 203.7—203.9 [Reserved]

Subpart B—How Does a State Apply for a Grant?

§ 203.10 What assurances must a State submit to receive a grant?

(a) A State that wishes to receive funds under this part for State agency projects designed to meet the special educational needs of neglected or delinquent children shall submit to the Secretary, through its SEA, assurances that the SEA will—

(1) Meet the requirements in section 435(b) (2) and (5) of the General Education Provisions Act (GEPA) relating to fiscal control and fund accounting procedures;

(2) Carry out the evaluation requirements in § 203.46; and

(3) Ensure that its State agencies comply with all applicable statutory and regulatory requirements.

(b) The assurances submitted under paragraph (a) of this section remain in effect for the duration of the SEA's participation in programs under this part.

(Authority: 20 U.S.C. 1232d(b) (2), (5), 2729 (b), (c), (d), 2838(c))

§§ 203.11—203.19 [Reserved]

Subpart C—How Does the Secretary Determine the Amount of a Grant?

§ 203.20 How does the Secretary determine the amount of a grant to an SEA?

(a) The Secretary annually determines the amount of funds under this part that State agencies in a State are eligible to receive in accordance with sections 1241(b) and 1291 of the Act.

(b) The Secretary annually notifies the SEA of the amount each State agency is eligible to receive under this part.

(Authority: 20 U.S.C. 2801(b), 2811)

§ 203.21 How does the Secretary determine the amount of a State agency grant?

(a) *Amounts of grants.* The Secretary determines the amount of a State agency grant according to section 1241 of the Act and the following data:

(1) Average daily attendance data, determined according to the provisions of paragraph (b) of this section, in the schools operated or supported by the State agencies in the State, including community day schools for neglected or delinquent children.

(2) The applicable average per pupil expenditure data.

(3) The amount appropriated for programs for neglected and delinquent children for the relevant fiscal year.

(b) *Determination of average daily attendance.* (1) Average daily attendance is computed for each institution or community day program serving neglected or delinquent children by—

(i) Calculating from daily attendance records the total number of days of attendance of children in the regular educational program, as defined in § 203.6(c), during the most recently completed school year; and

(ii) Dividing that total by 180.

(2) For the purpose of computing average daily attendance—

(i) A child is counted as being in a full day of attendance for each day the child attends the regular educational program for three or more hours; and

(ii) A child is counted as being in one-half day of attendance for each day the child attends the regular educational program for at least one hour, but less then three hours.

(3) To be counted in average daily attendance, a child must be—

(i) One for whom a State agency is providing a free public education; and

(ii) Enrolled for at least 10 hours a week in a regular educational program for which daily attendance records are kept.

(4) Neglected or delinquent children under this part, who are eligible for programs for handicapped children under 34 CFR Part 302, may be counted for grant determinations under both programs and may be served under both programs.

(Approved by the Office of Management and Budget under control number 1810-0060.)

(Authority: 20 U.S.C. 2801(b))

§ 203.22 What funds are available for an SEA to carry out its responsibilities?

(a) Except for programs under Part C of Chapter 1, an SEA shall use funds received under section 1404(a) of the Act for the proper and efficient performance of its duties under Chapter 1.

(b) The SEA may use not more than 15 percent of the funds referred to in paragraph (a) of this section for indirect costs.

(Authority: 20 U.S.C. 2824 (a), (b))

§§ 203.23—203.29 [Reserved]

Subpart D—How Does a State Agency Apply For and Receive a Subgrant?

§ 203.30 How does a State agency apply for a subgrant?

(a) A State agency shall submit an application to the SEA for a period of not more than three fiscal years.

(b) The application submitted by the State agency must include the following:

(1) A description of the procedures to be used to conduct an annual assessment of educational needs that meets the requirements of § 203.31.

(2) A description of the project to be conducted, including a budget for the initial project year.

(3) Data showing that the State agency has maintained fiscal effort as required by § 203.41.

(4) Other information the SEA may request.

(c) A State agency shall annually update an application that has been approved for more than one year by submitting the following information to the SEA:

(1) Data showing that the State agency has maintained fiscal effort as required by § 203.41.

(2) A budget for the expenditure of funds received under this part.

(d) If there are substantial changes in the numbers or the needs of children to be served or the services to be provided, the State agency shall submit a description of the changes to the SEA.

(Approved by the Office of Management and Budget under control number 1810-0060.)

(Authority: 20 U.S.C. 2721(a), 2724(b), 2728 (a), (b), (d), 2802 (a), (c))

§ 203.31 What are the State agency needs assessment requirements?

A State agency may receive funds under this part only if it conducts an annual assessment of all children in eligible institutions to—

(a) Identify the special educational needs of children in the institutions and children attending community day programs for neglected or delinquent children;

(b) Identify the general instructional areas on which the program will focus;

(c) Select for participation those children with the greatest need for special assistance; and

(d) Determine the special needs of participating children with sufficient specificity to ensure concentration on those needs.

(Authority: 20 U.S.C. 2724(b))

§ 203.32 Under what conditions does an SEA approve a State agency's application?

(a) An SEA shall approve a State agency's application for funds under this part if—

(1) The application meets the requirements in §§ 203.30 and 203.31; and

(2) The SEA determines that the State agency—

(i) Maintained fiscal effort in accordance with § 203.41; or

(ii) Has modified its application to take into account its reduced allocation if the State agency failed to maintain effort.

(b) An SEA may approve an application for a grant to a State agency for one year or for a period of up to three years if a State agency operates programs for children who participate for more than one year.

(c) SEA approval of an application under paragraph (a) of this section does not relieve the State agency of its responsibility to comply with all applicable requirements.

(Authority: 20 U.S.C 2802 (a), (c))

§§ 203.33—203.39 [Reserved]

Subpart E—What Post-Award Conditions Must Be Met by a State Agency?

§ 203.40 What costs are allowable?

(a) A State agency shall use funds under this part only for programs and projects (including the acquisition of equipment and, if necessary, the construction of school facilities) that are designed to—

(1) Meet the special educational and pupil services needs of children in institutions for neglected or delinquent children, children attending community day programs for neglected or delinquent children, or children in adult correctional institutions; and

(2) Support educational services supplemental to the basic education of neglected or delinquent children that must be provided by the State.

(b) (1) A State agency may reserve 10 percent or less of the funds it receives for any fiscal year under section 1241 of the Act for projects designed to facilitate the transition of children from State institutions or community day programs for neglected or delinquent children into locally operated programs.

(2) The services provided from the funds reserved under paragraph (b)(1) of this section may include, but are not limited to, the following:

(i) Supplemental instruction to improve achievement in basic and more advanced skills.

(ii) Pupil services, including counseling, psychological, and social work services designed to meet the needs of the children.

(iii) The services of persons with special responsibilities to act on behalf of individual children (ombudspersons).

(iv) Tutoring.

(v) Re-entry orientation programs.

(3) Projects funded under paragraph (b)(1) of this section may be conducted directly by the State agency, or by contracts or other arrangements with one or more of the following:

(i) One or more LEAs.

(ii) Other public agencies.

(iii) Private, nonprofit organizations.

(4) The special educational services funded under paragraph (b) of this section shall be provided to neglected or delinquent children in schools other than those operated for children in State institutions or community day programs for neglected or delinquent children.

(Authority: 20 U.S.C. 2802(a), 2803)

§ 203.41 What is the maintenance of effort requirement?

(a) (1) *Basic standard.* Except as provided in paragraph (b) of this section, an SEA shall pay a State agency its allocation of funds under this part if the SEA finds that either the combined fiscal effort per student or the aggregate expenditures of State funds with respect to the provision of free public education by the State agency for the preceding fiscal year was not less than 90 percent of the combined fiscal effort per student or the aggregate expenditures for the second preceding fiscal year.

(2) *Meaning of "preceding fiscal year."*—For purposes of determining maintenance of effort, the "preceding fiscal year" is the Federal fiscal year or the 12-month fiscal period most commonly used in a State for official reporting purposes prior to the beginning of the Federal fiscal year in which funds are available.

EXAMPLE: For funds first made available on July 1, 1989, if a State is using the Federal fiscal year, the "preceding fiscal year" is Federal fiscal year 1988 (which began on October 1, 1987) and the "second preceding fiscal year" is fiscal year 1987 (which began on October 1, 1986). If a State is using a fiscal year that begins on July 1, 1989, the "preceding fiscal year" is the 12-month period ending on June 30, 1988 and the "second preceding fiscal year" is the period ending on June 30, 1987.

(3) *Expenditures*—(i) *To be considered.* In determining a State agency's compliance with the maintenance of effort requirement, the SEA shall consider the State agency's expenditures from State funds for free public education. These include expenditures for the following:

(A) Instructional staff salaries.

(B) Salaries for educational administrators.

(C) Salaries for school support staff, including pupil services personnel and school clerical staff.

(D) Instructional supplies and materials.

(ii) *Not to be considered.* The SEA may not consider the following expenditures in determining a State agency's compliance with the maintenance of effort requirement:

(A) Any expenditures related primarily to the care of children in institutions rather than for free public education.

(B) Any expenditures for community services, capital outlay, or debt service.

(C) Any expenditures from funds provided under Chapter 1 and Chapter 2 of Title I of the Act or Chapter 1 and Chapter 2 of the ECIA.

(b) *Failure to maintain effort.* (1) If a State agency fails to maintain effort and a waiver under § 203.42 is not granted, the SEA shall reduce the State agency's allocation of funds under this part in the exact proportion by which the State agency fails to meet 90 percent of both the combined fiscal effort per student and aggregate expenditures (using the measure most favorable to the State agency) for the second preceding fiscal year.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year in which the State agency failed to maintain effort,

the SEA shall consider the State agency's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the State agency) for the third preceding fiscal year.

EXAMPLE: In Federal fiscal year 1990, a State agency fails to maintain effort because its fiscal effort in the preceding fiscal year (1988) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987). In assessing whether the State agency maintained effort during the next fiscal year (1991), the SEA may consider the State agency's expenditures for the second preceding fiscal year (1988) (the year that caused the State agency's failure to maintain effort) to be no less than 90 percent of the State agency's expenditures in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728(a), 2802(a))

§ 203.42 Under what circumstances may an SEA waive the maintenance of effort requirement?

(a) (1) An SEA may waive, for one fiscal year only, the maintenance of effort requirement in § 203.41 if the SEA determines that a waiver would be equitable due to exceptional or uncontrollable circumstances. These circumstances include, but are not limited to, the following:

(i) A natural disaster.

(ii) A precipitous and unforeseen decline in the financial resources of the State agency.

(2) An SEA may not consider tax initiatives or referenda to be exceptional or uncontrollable circumstances.

(b) (1) If the SEA grants a waiver under paragraph (a) of this section, the SEA shall not reduce the amount of funds under this part the State agency is otherwise entitled to receive.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year for which the waiver was granted, the SEA shall consider the State agency's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the State agency) for the third preceding fiscal year.

EXAMPLE: In fiscal year 1990, a State agency secures a waiver because its fiscal effort in the preceding year (1988) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987) due to exceptional or uncontrollable circumstances. In assessing whether the State agency maintained effort during the next fiscal year (1991), the SEA may consider the State agency's expenditures for the second preceding fiscal year (1988) (the year for which the State agency needed a waiver) to be no less than 90 percent of the State agency's expenditures in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728(a), 2802(a))

§ 203.43 What is the supplement, not supplant requirement that applies to the program?

(a) (1) Except as provided in paragraph (b) of this section, a State agency may use funds available under this part only to supplement and, to the extent practical, increase the level of non-Federal funds that would, in the absence of funds under this part, be made available for the education of pupils participating in projects funded under this part, and in no case may funds available under this part be used to supplant those non-Federal funds.

(2) In determining compliance with paragraph (a)(1) of this section, a program is considered to have met the requirement if funds under this part are used to either—

(i) Provide services that are supplemental to the services that would, in the absence of funds under this part, be provided to children participating in the program under this part; or

(ii) Increase the total number of hours of instruction that students receive with State funds and without regard to the subject area the additional instruction is provided.

EXAMPLE: The regular program of instruction in an institution provides classes with State funds in English, mathematics, and vocational education. Each student receives three hours of instruction each day. The Chapter 1 program provides a remedial reading class for children selected to receive Chapter 1 services. Although reading is not part of the regular program of instruction, the Chapter 1 remedial reading class is supplemental to the regular program because the Chapter 1 services provide additional instructional time for participating children.

(b) To meet the requirement in paragraph (a) of this section, a State agency is not required to provide services under this part through use of a particular instructional method or in a particular instructional setting.

(c) A State agency may exclude, for the purpose of determining compliance with the supplement, not supplant requirement in paragraph (a) of this section, State and local funds spent to carry out special programs that the Secretary has determined, in advance and in writing, meet the requirements of section 1018(d)(1)(B) of the Act.

(Authority: 20 U.S.C. 2728(b), (d) 2802(a), (c))

§ 203.44 What is included in the records of transferred students?

A State agency shall include any individualized education plans in the records of students who transfer to another State or local education agency.

(Approved by the Office of Management and Budget under control number 1810-0060.)

(Authority: 20 U.S.C. 2802(c))

§ 203.45 How may personnel be assigned supervisory duties?

(a) A State agency may assign personnel paid entirely with funds available under this part to limited supervisory duties that may provide some benefit to children not participating in the Chapter 1 project if—

(1) Similarly situated personnel at the same site, who are not paid with funds available under this part, are assigned these duties; and

(2) The time spent by Chapter 1 personnel on these duties does not exceed the least of the following:

(i) The proportion of total work time that similarly situated non-Chapter 1 personnel at the same site spend performing these duties.

(ii) One period per day.

(iii) Sixty minutes per day.

(b) The amount of time referred to in paragraph (a)(2) of this section may be calculated on a daily, weekly, monthly, or annual basis.

(c) The limited supervisory duties in paragraph (a) of this section need not be limited to classroom instruction and may include but are not limited to the following:

(1) Supervision of halls, playgrounds, lunchrooms, study halls, bus loading and unloading, and homerooms.

(2) Participation as a member of a school curriculum committee.

(3) Participation in the selection of regular curriculum materials and supplies:

(Authority: 20 U.S.C. 2853)

§ 203.46 What are the requirements for evaluating and reporting project results?

(a) *State agency evaluations.* (1) A State agency that receives funds under this part shall annually conduct an evaluation to determine the impact of the project on the ability of the participants to—

(i) Maintain and improve their educational achievement;

(ii) Maintain school credit in compliance with State requirements; and

(iii) Make the transition to regular or special education programs operated by LEAs or other public or private educational agencies.

(2) If an evaluation shows that a project is not making substantial progress in meeting the goals in paragraph (a)(1) of this section, the State agency shall make changes in the project, with the approval of the SEA, that will enable the project to meet those goals.

(b) *SEA evaluation.* (1) An SEA shall conduct an evaluation of programs under this part that is based on State agency data collected under paragraph (a) of this section at least once every two years.

(2) The SEA shall inform its State agencies, in advance, of the specific data that will be needed and how the data may be collected.

(3) The SEA shall—

(i) By a date established by the Secretary, submit the results of that evaluation to the Secretary; and

(ii) Make public the results of that evaluation.

(c) *Performance report.* (1) An SEA shall—

(i) Collect data specified in the Act and by the Secretary in the SEA's performance report; and

(ii) Submit those data to the Secretary.

(2) A State agency receiving funds under this part shall provide to the SEA any data needed by the SEA to complete its performance report.

(d) *Average daily attendance.* On a date specified by the Secretary each year, the SEA shall submit to the Secretary the average daily attendance data required under § 203.21(a).

(Approved by the Office of Management and Budget under control number 1810-0060.)

(Authority: 20 U.S.C. 2729(b), 2802(d), 2835(a), (d))

§§ 203.47—203.49 [Reserved]

Subpart F—What Are Other State Responsibilities for the Program?

§ 203.50 Does a State have authority to issue State regulations for the program?

(a) (1) Except as provided in paragraph (b) of this section, Chapter 1 does not preempt, prohibit, or encourage State rules, regulations, or policies issued pursuant to State law.

(2) If a State issues rules, regulations, or policies, they may not be inconsistent with the provisions of the following:

(i) The Chapter 1 statute.

(ii) The regulations in this part.

(iii) Other applicable Federal statutes and regulations.

(b) A State may not issue rules, regulations, or policies that limit a State agency's decisions regarding—

(1) Grade levels to be served;

(2) Basic skill areas to be addressed;

(3) Instructional settings, materials, or teaching techniques to be used;

(4) Instructional staff to be employed, as long as this staff meets State certification and licensing requirements for educational personnel; or

(5) Other essential support services.

(c) Nothing in paragraph (b) of this section limits an SEA's authority to review and approve State agencies' applications or to ensure that State agencies use Chapter 1 funds in accordance with all applicable requirements.

(d) The State shall identify any State rule, regulation, or policy relating to the administration and operation of Chapter 1 programs, including those based on State interpretation of any Federal law, regulation, or guideline, as a State-imposed requirement.

(e)(1) (i) Except as provided in paragraph (e)(1)(ii) and (iii) of this section, if a State issues major rules or regulations relating to the administration or operation of programs funded under this part, the State shall convene a State committee of practitioners to review before publishing any major proposed or final rule or regulation.

(ii) In an emergency situation in which a major rule or regulation must be issued within a very limited time to assist State agencies with the operation of programs under this part, the State—

(A) May issue the regulation without consulting the committee of practitioners; but

(B) Shall immediately thereafter convene the State committee of practitioners to review the emergency rule or regulation prior to issuance in final form.

(iii) The State shall ensure that the committee of practitioners reviews non-major rules or regulations before publication.

(2) If a State does not issue rules or regulations relating to the administration or operation of programs under this part but issues policies that the SEA and State agencies are required to follow, the State must comply with the requirements in this section for issuing rules and regulations.

(3) (i) The committee of practitioners must include—

(A) Administrators;

(B) Teachers; and

(C) Parents.

(ii) The majority of the committee must be representatives of State agencies.

(4) SEAs are encouraged to request from appropriate organizations recommendations for membership on the committee.

(Authority: 20 U.S.C. 2851)

§ 203.51 How can State personnel paid with Chapter 1 funds be assigned to State programs?

(a) As provided in paragraph (b) of this section, an SEA may use funds received under § 203.22(a) to pay the salary costs for any employee assigned to programs funded under this part and special State programs that meet the requirements of section 1018(d)(1) of the Act.

(b) Salary costs are allowable charges to funds received under § 203.22(a) if the following conditions are met:

(1) An employee's assignments are related to the SEA's administrative, training, and technical assistance responsibilities under the programs.

(2) The SEA maintains contemporaneous time distribution records reflecting the actual amount of time the employee spends on the programs.

(3) The time distribution records are signed by the employee's supervisor.

(4) Actual costs are charged to the programs on the basis of the employee's time distribution records.

(c) If an employee is assigned administrative, training, and technical assistance duties that jointly benefit programs funded under this part and special State programs that meet the requirements of § 200.45(a)(1)(i) and (a)(2), costs may be charged to the programs on a basis other than the time spent on each of the programs, provided charges are equitably distributed among funding sources.

EXAMPLE: An employee spends three hours developing a manual for State agencies to use to improve reading instruction in compensatory programs supported with funds under this part and under a State compensatory education program. Since only one manual is produced, the employee is unable to divide the actual time spent on each program. Therefore, the SEA may prorate costs, for example, to each program on the basis of the proportion of funds allocated for each of the programs benefiting from the manual.

(Authority: 20 U.S.C. 2728(d), 2853)

COMPLAINT PROCEDURES OF THE SEA

§ 203.52 What complaint procedures shall an SEA adopt?

An SEA shall adopt written procedures for—

(a) Receiving and resolving any complaint that the SEA or a State agency is violating a Federal statute or regulations that apply to programs under this part;

(b) Reviewing an appeal from a decision of a State agency with respect to a complaint; and

(c) Conducting an independent on-site investigation of a complaint if the SEA determines that an on-site investigation is necessary.

(Approved by the Office of Management and Budget under control number 1810-0600.)

(Authority: 20 U.S.C. 2831(a))

§ 200.53 What are the minimum complaint procedures?

An SEA shall include the following in its complaint procedures—

(a) A time limit of 60 calendar days after the SEA receives a complaint:

(1) If necessary, to carry out an independent on-site investigation; and

(2) To resolve the complaint.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) The right to request the Secretary to review the final decision of the SEA.

(Authority: 20 U.S.C. 2831(a))

§ 203.54 How does an organization or individual file a complaint?

An organization or individual may file a written signed complaint with an SEA. The complaint must include—

(a) A statement that the SEA or a State agency has violated a requirement of a Federal statute or regulations that apply to programs under this part;

(b) The facts on which the statement is based.

(Authority: 20 U.S.C. 2831(a))

§§ 203.55—203.59 [Reserved]

PART 205—CHAPTER 1—MIGRANT EDUCATION COORDINATION PROGRAM FOR STATE EDUCATIONAL AGENCIES

Subpart A—General

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205.3 Regulations that apply.
205.4 Definitions that apply.
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Subpart B—Types of Activities That the Secretary Assists Under This Program

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205.30 Application evaluation.
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205.32 Factors considered in awarding a grant.

AUTHORITY: 20 U.S.C. 2783, unless otherwise noted.

SOURCE: 48 FR 34646, July 29, 1983, unless otherwise noted.

Subpart A—General

§ 205.1 Purpose.

Chapter 1—Migrant Education Coordination Program for State Educational Agencies is designed to provide financial assistance to State educational agencies (SEAs) for projects designed to improve interstate and intrastate coordination of migrant education activities among SEAs and local educational agencies (LEAs). The projects may be designed to include SEAs, LEAs, and other operating agencies participating in the Chapter 1 Migrant Education Program.

(Authority: 20 U.S.C. 2733)

[48 FR 34646, July 29, 1983, as amended at 54 FR 20053, May 9, 1989]

§ 205.2 Eligibility to participate as a grantee.

Only SEAs, either individually or cooperatively (i.e., through a group or consortium), may apply for a grant under this program.

(Authority: 20 U.S.C. 2783)

§ 205.3 Regulations that apply.

The following regulations apply to this program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 75 (Direct Grant Programs), Part 77 (Definitions that Apply to Department Regulations), Part 79 (Intergovernmental Review of Department of Education Programs and Activities), Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, and Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(b) The regulations in this Part 205.

(Authority: 20 U.S.C. 2783)

[54 FR 20053, May 9, 1989]

§ 205.4 Definitions that apply.

The definitions that are included in the regulations for the Chapter 1 Migrant Education Program (34 CFR Part 201) apply to this program.

(Authority: 20 U.S.C. 2783)

[48 FR 34646, July 29, 1983, as amended at 54 FR 20053, May 9, 1989]

§ 205.5 Acronyms.

The following acronyms are used frequently in these regulations:

"LEA" means local educational agency.

"SEA" means State educational agency.

(Authority: 20 U.S.C. 2783)

Subpart B—Types of Activities That the Secretary Assists Under This Program

§ 205.10 Types of projects that may be funded.

The Secretary may make grants for a period not to exceed three years to an SEA or SEAs to carry out among State and local educational agencies projects designed to improve the interstate and intrastate coordination of the educational programs available for migratory students.

(Authority: 20 U.S.C. 2783)

[48 FR 34646, July 29, 1983, as amended at 54 FR 20053, May 9, 1989]

Subpart C—How To Apply for a Grant

§ 205.20 Information required in an application.

In applying for a grant, an SEA shall follow the procedures and meet the requirements stated in Subpart C of 34 CFR Part 75.

(Approved by the Office of Management and Budget under control number 1810-0028)

(Authority: 20 U.S.C. 2783)

§ 205.21 Specific information required in a group application.

In applying for a grant, an SEA shall provide information relevant to any proposed consortium of SEAs (for a group application only) as required by Subpart C of 34 CFR Part 75. In addition, the application must include:

(a) An identification of each SEA proposed to participate in the consortium;

(b) A description of the proposed objectives of the consortium; and

(c) A description of how each SEA proposed to participate in the consortium was involved in the development of the proposed objectives and activities of the project.

(Authority: 20 U.S.C. 2783)

§ 205.22 Consultation with other agencies.

An applicant SEA under the Migrant Education Interstate and Intrastate Coordination Program shall plan and develop its project in consultation and coordination with other SEAs or with participating LEAs, as appropriate.

(Authority: 20 U.S.C. 2783)

Subpart D—How Grants Are Made

§ 205.30 Application evaluation.

(a) The Secretary evaluates an application under this program on the basis of the criteria in § 205.31 of these regulations.

(b) The Secretary awards up to 100 possible points for meeting these criteria.

(c) The maximum number of points possible for meeting each individual criterion is indicated in parentheses after the heading for that criterion.

(Authority: 20 U.S.C. 2783)

§ 205.31 Selection criteria for reviewing an application.

(a) *Interstate and intrastate consultation and coordination.* (30 points) (1) The Secretary reviews each application for information that shows the quality of the applicant SEA's proposed consultation and coordination with other SEAs or with participating LEAs, as appropriate to effect improved interstate and intrastate coordination of programs available for migratory students (10 points).

(2) The Secretary reviews each application to determine the extent to which the proposed activities address unmet national needs (10 points).

(3) The Secretary looks for information that shows that the applicant SEA:

(i) Has consulted and coordinated adequately with other SEAs or participating LEAs, as appropriate, in planning, developing, and disseminating its project (5 points); and

(ii) Will consult and coordinate adequately with other SEAs or participating LEAs, as appropriate, in implementing and evaluating its project and in disseminating the results of the project (5 points).

(b) *Plan of operation.* (25 points) (1) The Secretary reviews each application for information that shows the quality of the plan of operation for the project.

(2) The Secretary looks for information that shows the following:

(i) High quality in the design of the project.

(ii) An effective plan of management that insures proper and efficient administration of the project.

(iii) A clear description of how the objectives of the project relate to the purpose of the program.

(iv) A clear description of the way that the applicant SEA plans to use its resources and personnel to achieve each objective of the project.

(v) A clear description of how the applicant SEA will provide equal access and treatment for eligible project participants who are members of groups that have been traditionally underrepresented, such as:

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(vi) A clear description of how the applicant SEA will provide an opportunity for participation of students enrolled in private schools.

(c) *Quality of key personnel.* (15 points) (1) The Secretary reviews each application for information that shows adequate qualifications of the key personnel the applicant SEA plans to use in the project.

(2) The Secretary looks for information that shows the following:

(i) The qualifications of the project director (if one is to be used).

(ii) The qualifications of each of the other key personnel to be used in the project.

(iii) The time that each person referred to in paragraphs (b)(2) (i) and (ii) of this section plans to commit to the project.

(iv) The extent to which the applicant SEA, as part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally underrepresented, such as:

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(3) To determine personnel qualifications, the Secretary considers experience and training—in fields related to the objectives of the project—as well as other information that the applicant SEA provides.

(d) *Budget and cost effectiveness.* (15 points) (1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows the following:

(i) The budget for the project is adequate to support the project activities.

(ii) Costs are reasonable in relation to the objectives of the project.

(e) *Evaluation plan.* (10 points) (1) The Secretary reviews each application for information that shows the quality of the evaluation plan for the project.

CROSS-REFERENCE. See 34 CFR 75.590 of EDGAR (Evaluation by the grantee).

(2) The Secretary looks for information that shows methods of evaluation that are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable.

(f) *Adequacy of resources.* (5 points) (1) The Secretary reviews each application for information that shows that the applicant SEA plans to devote adequate resources to the project.

(2) The Secretary looks for information that shows the following:

(i) The facilities that the applicant SEA plans to use are adequate.

(ii) The equipment and supplies that the applicant SEA plans to use are adequate.

(Authority: 20 U.S.C. 2783)

§ 205.32 Factors considered in awarding a grant.

In awarding grants, the Secretary considers:

(a) The amount of funds available for grants under the program;

(b) The rank order of the applications—as determined by using the criteria listed in § 205.31 of these regulations; and

(c) Other information contained in the application or that is otherwise relevant to a selection criterion or requirement that applies to the selection of applications for new grants.

(Authority: 20 U.S.C. 2783)

PART 206—SPECIAL EDUCATIONAL PROGRAMS FOR STUDENTS WHOSE FAMILIES ARE ENGAGED IN MIGRANT AND OTHER SEASONAL FARMWORK—HIGH SCHOOL EQUIVALENCY PROGRAM AND COLLEGE ASSISTANCE MIGRANT PROGRAM

Subpart A—General

Sec.

206.1 What are the special educational programs for students whose families are engaged in migrant and other seasonal farmwork?
206.2 Who is eligible to participate as a grantee?
206.3 Who is eligible to participate in a project?
206.4 What regulations apply to these programs?
206.5 What definitions apply to these programs?

Subpart B—What Kinds of Activities Does the Secretary Assist Under These Programs?

206.10 What types of services may be provided?

Subpart C—How Does One Apply for a Grant?

206.20 What must be included in an application?

Subpart D—How Does the Secretary Make a Grant to an Applicant?

206.30 How does the Secretary evaluate an application?
206.31 What selection criteria does the Secretary use to evaluate an application?

Subpart E—What Conditions Must Be Met by a Grantee?

206.40 What restrictions are there on expenditures?

AUTHORITY: 20 U.S.C. 1070d-2, unless otherwise noted.

SOURCE: 46 FR 35075, July 6, 1981, unless otherwise noted.

Subpart A—General

§ 206.1 What are the special educational programs for students whose families are engaged in migrant and other seasonal farmwork?

(a) *High School Equivalency Program.* The High School Equivalency Program (HEP) is designed to assist students—who are engaged, or whose families are engaged, in migrant and other seasonal farmwork—to obtain the equivalent of a secondary school diploma and subsequently to gain employment or be placed in an institution of higher education (IHE) or other postsecondary education or training.

(b) *College Assistance Migrant Program.* The College Assistance Migrant Program (CAMP) is designed to assist students—who are engaged, or whose families are engaged, in migrant and other seasonal farmwork—who are enrolled or are admitted for enrollment on a full-time basis in the first academic year at an IHE.

(Authority: 20 U.S.C. 1070d-2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987]

§ 206.2 Who is eligible to participate as a grantee?

(a) *Eligibility.* An IHE or a private nonprofit organization may apply for a grant to operate a HEP or CAMP project.

(b) *Cooperative planning.* If a private nonprofit organization other than an IHE applies for a HEP or a CAMP grant, that agency must plan the project in cooperation with an IHE and must propose to operate the project, or in the case of a HEP grant, some aspects of the project, with the facilities of that IHE.

(Authority: 20 U.S.C. 1070d-2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987]

§ 206.3 Who is eligible to participate in a project?

(a) *General.* To be eligible to participate in a HEP or a CAMP project, a person must be a migrant farmworker or other seasonal farmworker or a dependent of a migrant farmworker or other seasonal farmworker, as defined in § 206.5(c).

(b) *Special HEP qualifications.* To be eligible to participate in a HEP project, a migrant or other seasonally-employed farmworker or dependent must—

(1) Not have earned a secondary school diploma or its equivalent;

(2) Not be currently enrolled in an elementary or secondary school;

(3) Be above the age of compulsory school attendance in the State where the project is located; and

(4) Be determined by the grantee to need the academic and supporting services and financial assistance provided by the project in order to attain the equivalent of a secondary school diploma and to gain employment or be placed in an IHE or other postsecondary education or training.

(c) *Special CAMP qualifications.* To be eligible to participate in a CAMP project, a migrant or other seasonally-employed farmworker or dependent must—

(1) Be enrolled or be admitted for enrollment as a full-time student at the participating IHE;

(2) Not be beyond the first academic year of a program of study at the IHE, as determined under the standards of the IHE; and

(3) Be determined by the grantee to need the academic and supporting services and financial assistance provided by the project in order to complete an academic program of study at the IHE.

(Authority: 20 U.S.C. 1070d-2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987]

§ 206.4 What regulations apply to these programs?

The following regulations apply to HEP and CAMP:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of grants). 34 CFR Part 75 (Direct Grant Programs). 34 CFR Part 77 (Definitions That Apply to Department Regulations). 34 CFR Part 78 (Education Appeal Board), and 34 CFR Part 78 (Education Appeal Board), and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(b) The regulations in this Part 206.

(Authority: 20 U.S.C. 1070d-2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987]

§ 206.5 What definitions apply to these programs?

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1(c) (EDGAR, Definitions):

Applicant
Application
Elementary school
EDGAR
Facilities
Minor remodeling
Nonprofit
Private
Project
Public
Secondary school
Secretary
State

(b) *Definitions in the Grants Administration Regulations.* The following terms used in this part are defined in 34 CFR Part 74 (Administration of Grants):

Budget
Equipment
Grant
Grantee
Supplies

(c) *Program definitions.* The following additional definitions apply specifically to HEP and CAMP:

(1) "Act" means the Higher Education Act of 1965, as amended.

(2) "Agricultural activity" means:

(i) Any activity directly related to the production of crops, dairy products, poultry, or livestock;

(ii) Any activity directly related to the cultivation or harvesting of trees; or

(iii) Any activity directly related to fish farms.

(3) "Farmwork" means any agricultural activity, performed for either wages or personal subsistence, on a farm, ranch, or similar establishment.

(4) "Full-time," with respect to an individual, means a student who is carrying a full-time academic workload,

as defined in 34 CFR Part 690 (regulations for the Pell Grant Program).

(5) "Institution of higher education" means an educational institution that:

(i) Is in a State;

(ii) Is authorized by that State to provide a program of education beyond secondary school;

(iii) Is a public or nonprofit institution;

(iv) Admits as a regular student only a person who:

(A) Has a secondary school diploma;

(B) Has the recognized equivalent of a secondary school diploma; or

(C) Is beyond the age of compulsory school attendance in that State and has the ability to benefit from the training offered by the institution;

(v) Provides:

(A) An educational program for which it awards a bachelor's degree; or

(B) At least a two-year program that is acceptable for full credit toward a bachelor's degree;

(vi)(A) Is accredited by a nationally recognized accrediting agency or association;

(B) Has satisfactorily assured the Secretary that it will meet the accreditation standards of a nationally recognized accrediting agency or association within a reasonable time considering the resources available to the institution, the period of time, if any, it has operated, and its effort to meet accreditation standards; or

(C) Has its credits accepted on transfer by at least three accredited institutions on the same basis as those institutions accept transfer credits from fully accredited institutions.

(6) "Migrant farmworker" means a seasonal farmworker—as defined in paragraph (c)(7) of this section—whose employment required travel that precluded the farmworker from returning to his or her domicile (permanent place of residence) within the same day.

(7) "Seasonal farmworker" means a person who, within the past 24 months, was employed for at least 75 days in farmwork, and whose primary employment was in farmwork on a temporary or seasonal basis (that is, not a constant year-round activity).

(Authority: 20 U.S.C. 1070d-2(a))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987]

Subpart B—What Kinds of Activities Does the Secretary Assist Under These Programs?

§ 206.10 What types of services may be provided?

(a) *General.* A grantee may use funds under HEP or CAMP to support approved projects designed to provide academic and supporting services and financial assistance to eligible participants as described in § 206.3.

(b) *Types of services*—(1) *HEP projects.* A HEP project may provide the following types of services to assist participants in obtaining the equivalent of a secondary school diploma, and as needed, to assure the success of the participants in meeting the project's objectives and in succeeding at the secondary school level and beyond:

(i) Recruitment services to reach persons who are at least 17 years of age, who themselves or whose parents or guardians have spent a minimum of 75 days during the past 24 months in migrant and seasonal farmwork, and who lack a high school diploma or its equivalent.

(ii) Educational services that provide instruction designed to help students pass an examination and obtain a certificate that meets the guidelines for high school equivalency established by the State in which the project is located.

(iii) Supportive services that include the following:

(A) Personal, vocational, and academic counseling;

(B) Placement services designed to place students in a university, college, or junior college program, or in military services or career positions; and

(C) Health services.

(iv) Information concerning and assistance in obtaining available student financial aid.

(v) Weekly stipends for high school equivalency program participants.

(vi) Housing for those enrolled in residential programs.

(vii) Exposure to cultural events, academic programs, and other educational and cultural activities usually not available to migrant youth.

(viii) Other essential supportive services, as needed, to ensure the success of eligible students.

(2) *CAMP projects.* A CAMP project may provide the following types of services to assist the participants in meeting the project's objectives and in succeeding in an academic program of study at the IHE:

(i) Outreach and recruitment services to reach persons who themselves or whose parents or guardians have spent a minimum of 75 days the past 24 months in migrant and seasonal farmwork, and who meet the minimum qualifications for attendance at a college or university.

(ii) Supportive and instructional services, including:

(A) Personal, academic, and career counseling as an ongoing part of the program;

(B) Tutoring and academic-skill-building instruction and assistance;

(C) Assistance with special admissions;

(D) Health services; and

(E) Other services as necessary to assist students in completing program requirements.

(iii) Assistance in obtaining student financial aid that includes, but is not limited to, the following:

(A) Stipends.

(B) Scholarships.

(C) Student travel.

(D) Career-oriented work-study.

(E) Books and supplies.

(F) Tuition and fees.

(G) Room and board.

(H) Other assistance necessary to assist students in completing their first year of college or university.

(iv) Housing support for student living in institutional facilities and commuting students.

(v) Exposure to cultural events, academic programs, and other activities not usually available to migrant youth.

(vi) Other support services as necessary to ensure the success of eligible students.

(c) The health services, and other financial support services provided to participating students must:

(1) Be necessary to ensure their participation in the HEP or CAMP; and

(2) Not detract, because of the amount, from the basic educational services provided under those programs.

(Authority: 20 U.S.C. 1070d-2(b) and (c))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987]

Subpart C—How Does One Apply for a Grant?

§ 206.20 What must be included in an application?

In applying for a grant, an applicant shall:

(a) Follow the procedures and meet the requirements stated in Subpart C of 34 CFR Part 75 (EDGAR-Direct Grant Programs);

(b) Submit a grant application that:

(1) Covers a period of three years unless extraordinary circumstances warrant a shorter period; and

(2) Includes an annual budget of not less than $150,000;

(c) Include a management plan that contains:

(1) Assurances that the staff has a demonstrated knowledge of and will be sensitive to the unique characteristics and needs of the migrant and seasonal farmworker population; and

(2) Provisions for:

(i) Staff Inservice training;

(ii) Training and technical assistance;

(iii) Staff travel;

(iv) Student travel;

(v) Interagency coordination; and

(vi) Project evaluation; and

(d) Provide the following assurances:

(1) The grantee will develop and implement a plan for identifying, informing, and recruiting eligible participants who are most in need of the academic and supporting services and financial assistance provided by the project.

(2) The grantee will develop and implement a plan for identifying and using the resources of the participating IHE and the community to supplement and enhance the services provided by the project.

(Authority: 20 U.S.C. 1070d 2(a) and (d)-(f))

(Approved by the Office of Management and Budget under control number 1810-0055)

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920, July 1, 1987]

Subpart D—How Does the Secretary Make a Grant to an Applicant?

§ 206.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application under HEP or CAMP on the basis of the selection criteria listed in § 206.31.

(b) The Secretary awards up to 115 possible points for meeting these criteria.

(c) The maximum number of points possible for meeting each individual criterion is indicated in parentheses after the heading for that criterion.

(Authority: 20 U.S.C. 1070d-2(a) and (e))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920 and 24921, July 1, 1987]

§ 206.31 What selection criteria does the Secretary use to evaluate an application?

(a) *Plan of operation.* (25 points)

(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the project.

(2) The Secretary looks for information that shows the following:

(i) High quality in the design of the project.

(ii) An effective plan of management, as described in § 206.20(d), that ensures the proper and efficient administration of the project.

(iii) A clear description of how the objectives of the project relate to the purpose of the program.

(iv) A clear description of the way that the applicant plans to use its resources and personnel to achieve each objective of the project.

(v) A clear description of how the applicant will provide equal access and treatment for eligible participants who are members of groups that have been traditionally underrepresented, such as:

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(b) *Objectives and activities.* (20 points)

(1) The Secretary reviews each application for information that shows the quality of the design of objectives and activities for the students participating in the project.

(2) The Secretary looks for information that shows that:

(i) The objectives and activities of the project are designed to respond to the academic, supporting, and financial needs of the participating students; and

(ii) The size, scope, and quality of the activities will contribute successfully to meeting the project's objectives.

(c) *Evaluation plan.* (15 points)

(1) The Secretary reviews each application for information that shows the quality of the evaluation plan for the project.

CROSS-REFERENCE: See 34 CFR § 75.590 of EDGAR (Evaluation by the grantee).

(2) The Secretary looks for information that shows methods of evaluation that are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable.

(d) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application for information that shows adequate qualifications for the key personnel the applicant plans to use in the project.

(2) The Secretary looks for information that shows the following:

(i) The qualifications of the project director (if one is to be used).

(ii) The qualifications of each of the other key personnel to be used in the project.

(iii) The time that each person referred to in paragraphs (b)(2) (i) and (ii) of this section plans to commit to the project.

(iv) The extent to which the applicant, as part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally underrepresented, such as:

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(3) To determine personnel qualifications, the Secretary considers experience and training—in fields related to the objectives of the project—as well as other information that the applicant provides.

(e) *Budget and cost-effectiveness.* (10 points)

(1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows the following:

(i) The budget for the project is adequate to support the project activities.

(ii) Costs are reasonable in relation to the objectives of the project.

(f) *Interagency consultation and coordination.* (10 points)

(1) The Secretary reviews each application for information that shows adequate consultation and coordination with other agencies—in the State of the project—that provide services to migrant and other seasonally-employed farmworkers and their dependents.

(2) The Secretary looks for information that shows that the applicant:

(i) Has consulted and coordinated adequately with other appropriate agencies in planning and developing its project; and

(ii) Will consult and coordinate adequately with other appropriate agencies in implementing and evaluating the project.

(g) *Adequacy of resources.* (5 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the project.

(2) The Secretary looks for information that shows the following:

(i) The facilities that the applicant plans to use are adequate.

(ii) The equipment and supplies that the applicant plans to use are adequate.

(h) *Recruitment.* (5 points)

(1) The Secretary reviews each application for information that shows the quality of the recruitment plan for the project.

(2) The Secretary looks for information that shows that the applicant has adequate plans for identifying, informing, and recruiting eligible participants who are most in need of the academic and supporting services and financial assistance provided by the project.

(i) *Prior experience.* (15 points) (1) The Secretary considers the applicant's success, in any HEP or CAMP project conducted during the three fiscal years preceding the fiscal year for which the applicant is applying, in meeting the administrative requirements and programmatic objectives in paragraphs (a) (2) and (b)(2) of this section.

(2) The Secretary—based on information contained in the project application and in one or more of the following documents at the Secretary's disposal: performance reports, audit reports, site visit reports, project evaluation reports, the previously funded application, the negotiated program plan(s), the application under consideration, and similar reports and applications about the other projects the applicant has managed—considers:

(i) The extent to which the project's anticipated number of students were served and given access to college or university activities as provided in the approved grant application;

(ii) The extent to which project participants persisted toward completion of the academic programs in which they were enrolled. The Secretary considers:

(A) For a HEP project, the number of participants who successfully completed their specified courses of study and the number of participants who passed an examination and obtained a certificate that meets the guidelines for high school equivalency established by the State in which the project is located.

(B) For a CAMP project, the number of participants who completed their course of study, for the first year of the college or university attended, in good standing;

(iii) The extent to which an effective plan of management existed and was implemented to ensure the proper and cost effective administration of the project through provisions for—

(A) Staff inservice training and technical assistance; and

(B) Coordination with other existing programs that benefit the participating students and their families;

(iv) The extent to which the project assisted:

(A) HEP graduates to be placed in universities, junior colleges, the military services, career positions, or other post-secondary school activities; and

(B) CAMP students to continue in a post-secondary program of study after completion of the CAMP project; and

(v) The extent to which the applicant has met the administrative requirements—including recordkeeping, reporting, and financial accountability—under the terms of previously funded awards.

(3) The Secretary gives equal weight to each criterion listed in paragraphs (i)(2)(i)-(v) of this section.

(Approved by the Office of Management and Budget under control number 1810-0055)

(Authority: 20 U.S.C. 1070d-2)

(Authority: 20 U.S.C. 1070d-2(a) and (E))

[46 FR 35075, July 6, 1981, as amended at 52 FR 24920 and 24921, July 1, 1987]

Subpart E—What Conditions Must be Met by a Grantee?

§ 206.40 What restrictions are there on expenditures?

Funds provided under HEP or CAMP may not be used for construction activities, other than minor construction-related activities such as the repair or minor remodeling or alteration of facilities.

(Authority: Sec. 418A(a); 20 U.S.C. 1070d-2)

PART 208—MATHEMATICS AND SCIENCE EDUCATION PROGRAM

Subpart A—General

Sec.

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208.3 Definitions that apply to programs under this part.
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Subpart D—Higher Education Programs and Activities

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208.41 Supplement not supplant.
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Subpart F—Participation of Private Schools

208.51 Participation of children and teachers in private schools.
208.52 Bypass.
208.53—208.60 [Reserved]

AUTHORITY: 20 U.S.C. 2981-2993.

SOURCE: 54 FR 32937, Aug. 10, 1989, unless otherwise noted.

Subpart A—General

§ 208.1 Purpose.

The Secretary provides financial assistance under this part to states to strengthen the economic competitiveness and national security of the United States by improving the skills of teachers and the quality of instruction in mathematics and science in the Nation's public and private elementary and secondary schools.

(Authority: 20 U.S.C. 2982)

§ 208.2 Applicable regulations.

The following regulations apply to programs for which the Secretary provides financial assistance under this part:

(a) The regulations in this part.

(b) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of Grants to Institutions of Higher Education, Hospitals, and Nonprofit Organizations), part 76 (State-Administered Programs), part 77 (Definitions that Apply to Department Regulations), part 79 (Intergovernmental Review of Department of Education Programs and Activities), part 80 (uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), part 81 (General Education Provisions Act—Enforcement), and part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-free Workplace (Grants)).

(Authority: 20 U.S.C. 2981-2991, 2993)

§ 208.3 Definitions that apply to programs under this part.

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Application
Department
EDGAR
Elementary school
Fiscal year
Local educational agency (LEA)
Nonprofit
Private
Public
Secretary
State educational agency (SEA)

(b) *Additional definitions.* The following additional terms used in this part are defined as follows:

Act means Title II, part A of the Elementary and Secondary Education Act of 1965 (The Dwight D. Eisenhower Mathematics and Science Education Act).

Institution of higher education (IHE) has the meaning given that term in section 1201(a) of the Higher Education Act of 1965, 20 U.S.C. 1141(a).

Magnet school programs for gifted and talented students means programs for gifted and talented students in magnet schools or magnet programs in regular schools that attract gifted and talented students from other schools. Magnet schools are schools or education centers that offer a special curriculum, and include but are not limited to, schools or education centers capable of attracting substantial numbers of students of different racial backgrounds.

Nonprofit organizations include, but are not limited to, museums, libraries, educational television stations, professional science, mathematics, and engineering societies and associations, associations for the development and dissemination of projects designed to improve student understanding and performance in science and mathematics, and other organizations that meet the definition of "nonprofit" in 34 CFR 77.1.

Secondary school means a day or residential school that provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

State means each of the several States, the District of Columbia, and the Commonwealth of Puerto Rico. "State" also includes the "insular areas" of Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, and, as appropriate, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau (or the Trust Territory of the Pacific Islands (Palau), if the Compact of Free Association for Palau has not been ratified when funds are allocated).

State agency for higher education (SAHE) means the State board of higher education or other agency or officer primarily responsible for the State supervision of higher education, or, if there is no such officer or agency, an officer or agency designated for the purposes of this part by the Governor or by State law.

(Authority: 20 U.S.C. 2981-2991, 2993)

§§ 208.4—208.10 [Reserved]

Subpart B—Application Procedures

§ 208.11 State application.

(a) Of the amount allotted to each State under section 2004 of the Act, the Secretary awards, on the basis of approved State applications, 75 percent to the State's SEA for elementary and secondary education programs (in accordance with §§ 208.23, 208.24, and 208.25) and 25 percent to the State's SAHE for higher education programs (in accordance with § 208.33). The SEA shall apportion these funds in accordance with § 208.21; the SAHE shall apportion these funds in accordance with § 208.31.

(b) A State that desires to receive funds under this part shall have on file with the Secretary an application that covers a period of three fiscal years. Each State application must—

(1) Designate the SEA as the agency responsible for the administration and supervision of the elementary and secondary education programs described in subpart C of this part and the SAHE as the agency responsible for the administration and supervision of the higher education programs described in subpart D of this part;

(2) Provide assurances that—

(i) Payments will be distributed by the State in accordance with the provisions of § 208.21 and 208.31;

(ii) Provision will be made for the equitable participation of nonprofit private school children and teachers, in accordance with § 208.51, in elementary and secondary education programs described in subpart F of this part;

(iii) Provision will be made for fiscal control and accounting procedures to ensure proper accounting and expenditure of funds made available under this part;

(iv) Funds made available under this part will be used to supplement and not supplant non-Federal funds in accordance with § 208.41;

(v) During the three-year period of the plan, the State will evaluate its standards for teacher preparation, licensing, certification, and endorsement for elementary and secondary mathematics and science;

(vi) The State will take into account the needs for greater access to, and participation in, mathematics and science by students and teachers from historically underrepresented and underserved groups, including females, minorities, individuals with limited English proficiency, the economically disadvantaged and the handicapped;

(vii) The needs of teachers and students in areas of high concentrations of low-income students and sparsely populated areas will be considered in the distribution of funds reserved for State use; and

(viii) The programs conducted with State funds will be assessed annually (including collecting statistics on the number of students and teachers involved in these programs) and the data from these assessments, as well as a summary of the local assessments required under § 208.22(b)(1), will be submitted to the Secretary;

(3) Provide descriptions of—

(i) How, if appropriate, funds paid under this part will be coordinated with State and local funds and other Federal resources, particularly resources available from the National Science Foundation or the Department of Energy, or both;

(ii) Procedures for—

(A) Submitting applications for the programs described in subparts C and D of this part; and

(B) Approval of applications by the appropriate State agency, including procedures to ensure in accordance with 34 CFR 76.401 that the State agency will not disapprove an application without notice and opportunity for a hearing. Disapproval of an application does not include a determination by a SAHE as to the relative merit of a competing application submitted under § 208.32;

(iii) How programs under this part will meet the teacher training and curriculum needs projected under paragraph (b)(4) of this section;

(iv) Specific activities that will be undertaken that involve IHEs;

(v) Specific activities that will be supported with funds reserved for State use, and how those activities relate to the State's needs in mathematics and science; and

(vi) Specific activities the State will support to improve access of historically underrepresented groups in mathematics and science education; and

(4) Contain the following information:

(i) A projection of the supply and demand for teachers within the State in all the mathematics and science subject areas at the elementary and secondary levels, including a consideration of the impact of changing State graduation requirements and other State reforms on the supply of those teachers.

(ii) An assessment of the current elementary and secondary curriculum needs within the State in mathematics and science.

(c) The Secretary approves any State application that meets the requirements of this section.

(Approved by the Office of Management and Budget under control number 1810-0515)

(Authority: 20 U.S.C. 2988)

[54 FR 32939, August 10, 1989; 54 FR 43583, October 26, 1989]

§§ 208.12—208.20 [Reserved]

Subpart C—Elementary and Secondary Education Programs and Activities

§ 208.21 In-State apportionment.

(a) Each SEA shall distribute to LEAs within the State, for use under § 208.23, not less than 90 percent of the funds allotted to it under § 208.11(a), as follows:

(1)(i) Fifty (50) percent of the funds must be distributed to LEAs according to the relative enrollments in public and private nonprofit schools within the school districts of the LEAs. Relative enrollments may be calculated, at the option of the SEA, on the basis of the total number of children enrolled in public schools and—

(A) Private nonprofit schools; or

(B) Private nonprofit schools desiring that their children and teachers participate in programs or projects assisted under the Act.

(ii) Nothing in paragraph (a)(1)(i) of this section diminishes the responsibility of an LEA to contact, on an annual basis, appropriate officials of private nonprofit schools within its school district to determine whether those officials desire that their children and teachers participate in programs or projects funded under the Act.

(2) Fifty (50) percent of the funds must be distributed to LEAs in the same proportion as funds under part A of chapter 1 of title I of the Elementary and Secondary Education Act of 1965, are distributed.

(b) Each SEA shall use not less than five percent of the total funds allotted to it under § 208.11(a) for demonstration and exemplary program activities described in § 208.24.

(c) Each SEA shall use not more than five percent of the funds allotted to it under § 208.11(a) for technical assistance and administrative costs, as described in § 208.25.

(Authority: 20 U.S.C. 2986)

§ 208.22 LEA application.

(a) An LEA that desires to receive an allocation of funds under subpart C of this part shall submit to the SEA an application that covers a period of three fiscal years and meets the requirements of this section.

(b) An LEA may apply for funds under paragraph (a) of this section, singly or in conjunction with other LEAs, IHEs, or an intermediate educational unit to conduct programs under § 208.23. Each LEA application must include—

(1) A summary assessment of—

(i) The needs of its current teachers in mathematics and science and whether a shortage of qualified teachers in these subjects exists or will exist within five years of the date of the application;

(ii) The current levels of mathematics and science student achievement in the LEA; and

(iii) The curricular needs of the LEA In mathematics and science;

(2) Information the SEA may require describing the LEA's proposed activities and expenditures of funds for those activities under § 208.23. This information must include, at minimum, a description of—

(i) How the LEA plans to use funds received under this part to meet the needs described in paragraph (b)(1)(i) of this section;

(ii) If applicable, how funds it receives under this part will be coordinated with State, local, and other Federal resources, especially with respect to any programs available from the National Science Foundation, the Department of Energy, or both; and

(iii) If applicable, how the assisted programs will use other resources of the community and involve public agencies, private industry, IHEs, public and private nonprofit organizations, and other appropriate institutions; and

(3) Assurances that—

(i) Programs will take into account the need for greater access to and participation in mathematics and science programs by students from historically underrepresented groups, including females, minorities, individuals with limited English proficiency, the economically disadvantaged, and the handicapped; and

(ii) Programs assisted will be assessed and progress made will be reported, in terms of numbers of teachers and students affected, and the results will be submitted to the SEA in the time and manner that the SEA requires.

(c) Notwithstanding paragraph (a) of this section, an LEA that has applied for funds singly or in conjunction with other LEAs, IHEs, or an intermediate educational unit, and that desires to change the basis on which its programs are funded, shall submit to the SEA an amended application for the remainder of the application period. The amended application must update the information required by paragraph (b) of this section.

(d) (1) The SEA shall renew payments to the LEA under this program if it determines on the basis of its review of the LEA's application and any other information it may have, that the LEA is making adequate progress toward the goals of this part.

(2) If the SEA determines that the LEA has not made adequate progress toward meeting the goals of this part, the SEA may—

(i) Approve revisions to the programs funded under this part that are proposed by the LEA, if those revisions will enable the LEA to meet the goals of this part; or

(ii) After affording the LEA notice and opportunity for a hearing, disapprove the LEA's application.

(Approved by the Office of Management and Budget under control number 1810-0515)

(Authority: 20 U.S.C. 2989)

[54 FR 32939, August 10, 1989; 54 FR 43583, October 26, 1989]

§ 208.23 Use of funds by LEAs.

(a) An LEA shall use the funds it receives under § 208.21(a) to support one or more of the following:

(1) The expansion and improvement of preservice and inservice training and retraining for teachers and other appropriate school personnel in the fields of mathematics and science, including vocational education teachers who use mathematics and science in teaching vocational education courses.

(2) Recruitment or retraining of minority teachers to become mathematics and science teachers.

(3) Training in and instructional use of computers, video, and other telecommunications technologies as part of a mathematics and science program (which may include the purchase of computers or other telecommunications equipment in schools with an enrollment of 50 percent or more of students from low-income families after all other training needs have been met).

(4) Integrating higher-order analytical and problem-solving skills into the mathematics and science curriculum.

(5) Providing funds for grants projects for individual teachers within the LEA to undertake projects to improve either their teaching ability or the instructional materials they use in their mathematics and science classrooms.

(b) An LEA may carry out the training and instruction under this section—

(1) Through agreements with public agencies, private industry, IHEs, and nonprofit organizations; and

(2) In conjunction with one or more LEAs within the State, with the SEA, or with both LEAs and the SEA.

(c) An LEA may use not more than five percent of the funds it receives under § 208.21 for local administration of these programs.

(Authority: 20 U.S.C. 2986)

§ 208.24 Use of funds by SEAs for demonstration and exemplary programs.

(a) An SEA shall use the funds described under § 208.21(b) to support one or more of the following:

(1) Demonstration and exemplary programs in the fields of mathematics and science for—

(i) Teacher training and retraining and inservice upgrading of teacher skills;

(ii) Instructional equipment and materials and necessary technical assistance; or

(iii) Special projects for historically underrepresented and underserved populations and for gifted and talented students.

(2) The dissemination of information relating to demonstration and exemplary programs to all LEAs within the State.

(b) In funding demonstration and exemplary programs under paragraph (a)(1) of this section, the SEA shall give special consideration to special projects in mathematics and science for—

(1) Students from historically underrepresented and underserved populations, including females, minorities, handicapped individuals, individuals with limited English proficiency, and migrant students; and

(2) Gifted and talented students. A program for gifted and talented students may include assistance to a magnet school program for those students.

(Authority: 20 U.S.C. 2986)

§ 208.25 Use of funds by SEAs for technical assistance and administrative costs.

An SEA may use the funds described under § 208.21(c)—

(a) To provide technical assistance to LEAs and, if appropriate, IHEs and nonprofit organizations that are conducting programs under § 208.23; and

(b) For the costs incurred by the SEA in administering and assessing programs assisted under this part.

(Authority: 20 U.S.C. 2986)

§§ 208.26—208.30 [Reserved]

Subpart D—Higher Education Programs and Activities

§ 208.31 Apportionment of funds.

(a) *Funds for IHEs.* (1) A SAHE shall distribute not less than ninety-five (95) percent of the funds it receives under § 208.11(a) to IHEs in accordance with the application procedures governing IHEs in § 208.32.

(2) The SAHE shall make every effort to ensure equitable participation of public and private IHEs.

(3) The SAHE may use funds described in this section for cooperative programs among IHEs, LEAs, SEAs, private industry, and nonprofit organizations, for the development and dissemination of projects designed to improve student understanding and performance in science and mathematics.

(b) *Funds retained by SAHEs.* A SAHE may reserve not more than five percent of the funds it receives under § 208.11 for the costs incurred by the SAHE for the State assessment of curriculum needs required by § 208.11(b)(4)(ii) and for administration and evaluation of programs assisted under this part.

(Authority: 20 U.S.C. 2987)

§ 208.32 IHE application.

An IHE wishing to receive a grant for programs funded under the Act may apply to the SAHE on a competitive basis either as an individual subgrantee or on behalf of a proposed cooperative program (see § 208.31(a)(2)). The application must contain information that the SAHE may require, and must demonstrate the IHE's involvement with one or more LEAs, as required by § 208.33(d).

(Authority: 20 U.S.C. 2987)

§ 208.33 Use of funds by IHEs.

(a) Subject to the requirement in paragraph (c) of this section, an IHE shall use funds awarded under § 208.31(a) for one or more of the following activities:

(1) Establishing traineeship programs for new teachers who will spe-

cialize in teaching mathematics and science at the secondary school level.

(2) Retraining. (i) Teachers who specialize in disciplines other than the teaching of mathematics and science, to specialize in the teaching of mathematics and science; or

(ii) Mathematics and science secondary school teachers to expand their areas of specialization within those disciplines (e.g., retraining biology teachers in physics or geometry teachers in calculus) or to expand their specializations across disciplines (e.g., retraining biology teachers in algebra).

(3) Inservice training for elementary, secondary, and vocational school teachers and training for other appropriate school personnel to improve their teaching skills in the fields of mathematics and science.

(b) Support for inservice training and retraining includes the provision of stipends for participation in institutes authorized under Title I of the EESA or any other program of the National Science Foundation.

(c) Each IHE receiving funds under this part shall ensure that programs of training, retraining, and inservice training will take into account the need for greater access to and participation in mathematics and science, and careers for—

(1) Students from historically underrepresented and underserved groups, including females, minorities, individuals with limited English proficiency, the handicapped, and migrants; and

(2) Gifted and talented students.

(d)(1) To receive funds for programs under paragraphs (a)(2) and (3) of this section, and IHE shall enter into an agreement with an LEA, or a consortium of LEAs, to provide inservice training and retraining for elementary and secondary school teachers in public and private schools in the LEA or LEAs.

(2) In the agreement, the IHE shall provide evidence that proposed projects and activities are the result of cooperative planning with LEAs affected, and that those projects and activities reflect the training, retraining, and inservice training needs of teachers as determined jointly by the LEA or LEAs and the IHE.

(Authority: 20 U.S.C. 2987)

[54 FR 32937, Aug. 10, 1989; 54 FR 47301, Nov. 13, 1989]

§§ 208.34—208.40 [Reserved]

Subpart E—Fiscal Requirements

§ 208.41 Supplement not supplant.

A grantee or subgrantee that receives funds under this part—

(a) May use those funds only to supplement and, to the extent practicable, to increase the level of funds from non-Federal sources that, in the absence of funds made available under this part, would be made available for the purposes described in subparts C and D of this part; and

(b) May not use funds made available under this part to supplant funds from non-Federal sources.

(Authority: 20 U.S.C. 2988)

§§ 208.42—208.50 [Reserved]

Subpart F—Participation of Private Schools

§ 208.51 Participation of children and teachers in private schools.

(a) *Participation of private nonprofit school students.* To the extent consistent with the number of children in a State or an LEA who are enrolled in private nonprofit elementary and secondary schools, the SEA or LEA shall, after consultation with appropriate private nonprofit school representatives, make provisions for including services and arrangements for the benefit of these children to ensure their equitable participation in the purposes and benefits of this part.

(b) *Participation of private nonprofit school teachers.* (1) To the extent consistent with the number of children in the State or an LEA who are enrolled in private nonprofit elementary and secondary schools, an SEA, LEA, SAHE, or IHE shall, after consultation with appropriate private nonprofit school representatives, make provision for teacher training, retraining, and inservice training for the benefit of private nonprofit school teachers as will ensure their equitable participation in the purposes and benefits of this part.

(2) To receive funds for programs under § 208.33(a)(2) and (3), an IHE shall meet the requirements in § 208.33(d) for serving teachers in public and private nonprofit elementary and secondary schools.

(c) *Applicable requirements.* In fulfilling the equitable participation requirements in paragraphs (a) and (b) of this section an SEA, LEA, or IHE shall comply with the provisions in 34 CFR 76.650-76.662 regarding equipment and supplies and construction.

(Authority: 20 U.S.C. 2990)

§ 208.52 Bypass.

The Secretary implements a bypass if—

(a) An SEA, LEA, or IHE is prohibited by law from providing for the participation of children or teachers from private nonprofit schools as required by § 208.51; or

(b) The Secretary determines that an SEA or LEA has substantially failed or is unwilling to provide for the participation of children or teachers from private nonprofit schools on an equitable basis.

(Authority: 20 U.S.C. 2990)

§§ 208.53—208.60 [Reserved]

PART 212—EVEN START

Subpart A—General

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AUTHORITY: 20 U.S.C. 2741-2749, unless otherwise noted.

SOURCE: 54 FR 12141, Mar. 23, 1989, unless otherwise noted.

Subpart A—General

§ 212.1 What is the Even Start program?

(a) The Even Start program grants funds to eligible local educational agencies (LEAs) for the Federal share of the cost of providing family-centered education projects to help parents become full partners in the education of their children, to assist children in reaching their full potential as learners, and to provide literacy training for their parents.

(b) The Secretary implements the Even Start program by assisting cooperative projects that build on existing community resources to create a new range of services, integrating early childhood education and adult education for parents.

(Authority: 20 U.S.C. 2741, 2744(a))

§ 212.2 Who is eligible for a grant?

(a) An applicant is eligible to receive assistance under the Even Start program if it—

(1)(i) Is an LEA that has within its geographic jurisdiction eligible participants, as defined in paragraph (b) of this section; or

(ii) Is a consortium of LEAs, each of which has within its geographic jurisdiction eligible participants; and

(2) Has collaborated regarding the proposed project with, if appropriate, institutions of higher education, community-based organizations, its State educational agency (SEA), or other appropriate nonprofit organizations.

(b) Eligible participants are—

(1) A parent of a child described in paragraph (b)(2) of this section, if the parent is eligible for participation in an adult education program under the Adult Education Act, 20 U.S.C. 1201(a) (1) and (2); and

(2) A child, age 1 to 7, inclusive, of any eligible parent, who resides in an elementary school attendance area designated for participation in programs under Part A of Chapter 1 of Title I of the Act.

(Authority: 20 U.S.C. 2742(a), 2744(a), 2745)

§ 212.3 What activities may the Secretary or States fund?

The Secretary or each SEA, as the case may be, funds family-centered education projects that comply with section 1054 of the Act, and that include all of the program elements required by section 1054(b) of the Act.

(Authority: 20 U.S.C. 2744)

§ 212.4 What is the duration of a project?

No LEA project may exceed four years.

(Authority: 20 U.S.C. 2747(d))

§ 212.5 What regulations apply?

The following regulations apply to the Even Start program:

(a) If the Secretary makes direct grants to LEAs under section 1052(a) of the Act, the Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 75 (Direct Grant Programs), Part 77 (Definitions That Apply to Department Regulations), Part 79 (Intergovernmental Review of Department of Education Programs and Activities), Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), and Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(b) If the Secretary makes grants to States under section 1052(b) of the Act, the EDGAR in 34 CFR Part 76 (State-Administered Programs), Part 77 (Definitions that Apply to Department Regulations), Part 79 (Intergovernmental Review of Department of Education Programs and Activities), Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), and Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(c) The regulations in this Part 212.

(Authority: 20 U.S.C. 2831(a))

§ 212.6 What definitions apply?

(a) *Definitions in the Act.* The following terms used in this part are defined in section 1471 of the Act:

Elementary school
Equipment
Local educational agency
Parent
Secretary
State educational agency

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
Department
Facilities
Fiscal year
Grant
Grant period
Grantee
Project

(c) *Other definitions.* The following definitions also apply to this part:

Act means the Elementary and Secondary Education Act of 1965, as amended.

State means any of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(Authority: 20 U.S.C. 2742(c), 2831(a))

Subpart B—How Does an LEA or Consortium of LEAs Apply for a Grant?

§ 212.10 To whom does an LEA submit an application?

An applicant shall submit an application to the Secretary under section 1052(a) of the Act, in the form required by the Secretary, or to the SEA under section 1052(b) of the Act, in the form required by the State, as the case may be.

(Authority: 20 U.S.C. 2746(a))

§ 212.11 What requirements apply for submitting an application to the Secretary for a new grant?

Before submitting an application to the Secretary for a new grant under section 1052(a) of the Act, an applicant shall—

(a) Give reasonable notice of the general public's opportunity to testify or otherwise comment at an open meeting regarding the subject matter of the application;

(b) Hold the open meeting; and

(c) Consider comments obtained at the meeting in developing the final application.

(Authority: 20 U.S.C. 3386)

Subpart C—How Does the Secretary Make a Grant?

NEW GRANTS

§ 212.20 How does the Secretary evaluate an application for a new grant?

(a) *Review panel.* (1) The Secretary appoints a panel to review applications in accordance with section 1057 of the Act.

(2) In order for the applicant to be considered for a new grant, a majority of the panel members must agree, in accordance with section 1057(a)(5) of the Act, that the applicant has adequately demonstrated its ability to provide the additional funding required by section 1054(c) of the Act.

(3)(i) The panel evaluates an application for a new grant on the basis of the criteria in § 212.21.

(ii) The panel gives up to 100 points for these criteria.

(iii) The maximum possible score for each complete criterion in § 212.21 is indicated in parentheses.

(b) *Additional factors.* The Secretary then applies the additional considerations in § 212.22 to make grants.

(Authority: 20 U.S.C. 2747)

§ 212.21 What selection criteria are used in making new grants?

The following criteria are used to evaluate an application for a new grant:

(a) *Likelihood of success in meeting the Even Start goals* (35 total points). The Secretary reviews each application to determine the extent to which the proposed project will provide a family-centered education program that includes activities to promote literacy of participating parents, train parents to support the educational growth of their children, and prepare children for success in regular school programs. In applying this criterion the Secretary determines the extent to which the project described in the application—

(1) Contains clear, attainable, measurable objectives against which the progress and success of the project will be measured (5 points);

(2) Includes appropriate activities, services, and timelines to achieve those objectives (5 points);

(3) Designates responsibilities to specific personnel who are qualified to administer and implement the project and to provide special training necessary to prepare staff for the program (5 points);

(4) Includes an effective plan to ensure proper and efficient administration of the project (5 points);

(5) Is based on sound research in the areas of early childhood education, adult literacy, and parenting education (5 points);

(6) Contains instructional and developmental activities appropriate to the level of the participants to be served (5 points); and

(7) Provides for continuity of services to maintain progress by, for example, providing continuous services through the summer months (5 points).

(b) *Percentage of eligible children and parents to be served* (10 points). (1) The Secretary reviews each application to determine the total percentage of eligible children and parents that will be served under the proposed project. This percentage is determined by dividing the number of parents and children to be served by the project by the total number of eligible parents and children who are not currently receiving these or similar family-centered services.

(2) The Secretary gives points on the basis of that percentage, as follows:

more than 80%	10 points
70-79%	8 points
60-69%	6 points
50-59%	5 points
40-49%	4 points
30-39%	3 points
20-29%	2 points
1-19%	1 point

(3) As used in paragraph (b)(1) of this section, the term "similar family-centered services" means services that—

(i) Focus on the parents and children as a unit;

(ii) Are designed so that parents and children can work on activities together, with services provided in the home to the extent possible; and

(iii) Are designed—

(A) To help parents become full partners in the education of their children;

(B) To assist children in reaching their full potential as learners; and

(C) To ensure that parents are provided with literacy training.

(c) *Degree of cooperation and coordination* (30 total points). The Secretary reviews each application to determine the extent to which cooperation and coordination will take place in all phases of the proposed project among a variety of relevant service providers, including those funded under the programs listed in section 1054(b)(7) of the Act. The Secretary considers the extent to which—

(1) The applicant has made a survey of all relevant providers and is fully aware of similar and related services, including State and locally funded programs, being provided to eligible children and adults (5 points);

(2) The applicant has, in planning the project, engaged various providers in discussions that have resulted in firm agreements for specific cooperative activities (10 points);

(3) The plan of operation includes specific provision for additional cooperative efforts with other service providers, including State and locally funded providers, throughout the duration of the project (5 points); and

(4) Services offered by the applicant will build upon, but not duplicate, those being provided to project participants by the applicant or other service providers (10 points).

(d) *Reasonableness of budget* (10 points). The Secretary reviews each application to determine the extent to which the budget submitted for the entire cost of the proposed project appears reasonable, given the scope of the project. The Secretary considers the extent to which—

(1) Costs are reasonable in relation to expected outcomes;

(2) The applicant will make use of currently available resources such as facilities and equipment; and

(3) The budget provides sufficient information to support the requested amount of funds.

(e) *Promise as a model* (15 total points). The Secretary reviews each application to determine the extent to which the proposed project shows promise in providing a model that may be transferred to other LEAs. The Secretary considers the extent to which—

(1) The preliminary evaluation plan described in the application—

(i) Measures the progress and success of the project in achieving its clearly stated and attainable objectives;

(ii) Utilizes concrete and quantifiable means of measurement; and

(iii) Includes, if possible, comparisons with appropriate control groups (8 points);

(2) The general components of the project are readily understandable and usable by other entities, and are based on research or models that have proven to be adaptable to various circumstances (5 points); and

(3) The applicant shows a willingness to serve as a model and to disseminate detailed information about the project to the Department and to other LEAs (2 points).

(Approved by the Office of Management and Budget under control number 1810-0540.)

(Authority: 20 U.S.C. 2744(b)(7), 2747, 2831(a))

§ 212.22 What additional factors does the Secretary consider in making new grants?

(a) The Secretary, in approving grants, ensures that—

(1) Each project builds on existing community resources in a cooperative effort to create a new range of services integrating early childhood education and adult education for parents into a unified program; and

(2)(i) Grants are made to LEAs that are representative of urban and rural regions of the United States.

(ii) Grant funds are distributed equitably among the States, among urban and rural areas of the United States, and among urban and rural areas of a State.

(b) In order to meet the requirements of paragraph (a)(2) of this section, the Secretary—

(1) Separates applications into categories of "urban" and "rural" on the basis of paragraph (c) of this section;

(2) In each category—

(i) Determines the highest scoring application from each State and places these applications in order of their scores; and

(ii) Places all remaining applications in order of their scores; and

(3) Funds equal numbers of projects in each category provided there are sufficient acceptable applications in each category, by—

(i) First funding acceptance applications from paragraph (b)(2)(i) of this section in order of their scores; and

(ii) Then funding acceptable applications under paragraph (b)(2)(ii) of this section in order of their scores.

(c)(1) For the purpose of this section, urban LEAs are those within Standard Metropolitan Statistical Areas (SMSAs), as most recently designated by the United States Department of Commerce, Bureau of Census, and rural LEAs are those outside the boundaries of SMSAs.

(2) If an LEA includes areas both within the outside of an SMSA, the applicant shall designate the category in which the majority of expected participants reside.

(d) To the extent that acceptable applications are received from the various States, the Secretary does not give grants to LEAs in one State in amounts that, in total, exceed the amount that the State would be allocated under section 1053(b) of the Act if the appropriation for the Even Start program equals $50 million.

(Authority 20 U.S.C. 2741, 2747(a)(6), (c), (d)(2))

§§ 212.23—212.24 [Reserved]

CONTINUATION AWARDS

§ 212.25 How does the Secretary make continuation awards if there are insufficient appropriations to fund all requests fully?

(a) If funds are insufficient for the Secretary to fund all continuation requests in the amounts at which each request would otherwise be funded ("approvable grant" amounts), the Secretary reduces the approvable grant awards for continuation requests on a *pro rata* basis.

(b) The Secretary does not reduce funding for a project for any fiscal year more than 25 percent below its approvable grant level, subject to paragraph (c) of this section.

(c) If funds are insufficient to fund all continuation awards at 75 percent of their approvable grant levels, the Secretary—

(1) Ranks all continuation requests based on the criteria in § 212.21, taking into account information collected throughout the project period, including yearly progress reports, the application submitted in the first year, and revisions to that application; and

(2) Funds continuation requests based on that rank ordering, at 75 percent of approvable grant levels until funds are exhausted.

(d) If the ranking procedure in paragraph (c) of this section does not result in the distribution of awards consistent with the requirements of § 212.22(a), the Secretary adjusts the selection process so as to meet those requirements.

(Authority: 20 U.S.C. 2831(a))

§ 212.26 What actions may the Secretary or an SEA take if a grantee does not make sufficient progress toward meting its project objectives?

If the Secretary or an SEA finds, after the first, second, or third year of a project, that the grantee has not made sufficient progress toward meeting its project objectives, the Secretary or SEA may—

(a) Approve revisions to the project, proposed by the LEA, if those revisions would enable the grantee to meet its project objectives; or

(b) After affording the LEA notice and an opportunity for a hearing, refuse to make a continuation award to the LEA for that project.

(Authority: 20 U.S.C. 2747(d)(1))

Subpart D—[Reserved]

Subpart E—Transition Provisions

§ 212.40 How are grants made in a fiscal year in which responsibility for making grants to applicants transfers between the Department and the SEAs?

If the responsibility for administering the Even Start program transfers from the Department to the SEAs, or *vice versa*—

(a) The Secretary applies—

(1) 34 CFR 75.253 with the exception of 34 CFR 75.253(a)(2);

(2) Section 212.26; and

(3) Section 212.25, if necessary;

(b)(1) An SEA shall continue a project grant for the total original period of time for which the grant was made if, for each project—

(i) The grantee shows that it is making sufficient progress toward meeting the objectives of the project;

(ii) The grantee meets applicable State requirements for continuation awards; and

(iii) Sufficient funds exist for the SEA to continue all project grants;

(2) For the project period, funds unobligated by a grantee in one project year remain with the grantee, and the SEA deducts from the subsequent year's continuation award an amount equal to the unobligated funds;

(3) After making continuation awards, the SEA shall use any remaining funds to make grants to new applicants; and

(c) The Federal share limitations contained in section 1054(c) of the Act are determined from the original year of the project grant award.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2747(d), 2831(a))

Subpart F—Migrant Education Even Start

AUTHORITY: 20 U.S.C. 2741-2749, 2831, unless otherwise noted.

SOURCE: 54 FR 22729, May 25, 1989, unless otherwise noted.

§ 212.50 What is the Migrant Education Even Start program?

(a) The Migrant Education Even Start program supports grants to eligible SEAs for the cost of providing family-centered education projects to help parents of currently migratory children (as defined in 34 CFR 201.3) become full partners in the education of their children, to assist currently migratory children in reaching their full potential as learners, and to provide literacy training for their parents

(b) The Secretary makes grants for family-centered education projects that provides services on an intrastate or interstate basis, and that include all of the program elements required by section 1054(b) of the Act.

(Authority: 20 U.S.C. 2741, 2743, 2831)

§ 212.51 Who is eligible for a grant?

An SEA or a consortium of SEAs that applies under section 1053(a) of the Act is eligible to receive a grant under the Migrant Education Even Start program.

(Authority: 20 U.S.C. 2743, 2831)

§ 212.52 Who may be served?

Persons who may be served by a project under this subpart are—

(a) A parent of a child described in paragraph (b) of this section, if the parent is eligible for participation in an adult basic education program under the Adult Education Act, 20 U.S.C. 1201(a)(1) and (2); and

(b)(1) As a first priortiy, a currently migratory child, aged 1 to 7 inclusive, as defined in 34 CFR 201.3; and

(2) As a second priority and if space is available, a formerly migratory child, aged 1 to 7 inclusive, as defined in 34 CFR 201.3.

(Authority: 20 U.S.C. 2743, 2745, 2831)

§ 212.53 What applications does the Secretary consider?

The Secretary considers an application that—

(a) Meets the purposes of the Migrant Education Even Start program as provided in § 212.50; and

(b) Adequately demonstrates the applicant's ability to provide the additional funding required by section 1054(c) of the Act.

(Authority: 20 U.S.C. 1070d-2(a) and (e), 2743)

§ 212.54 How does the Secretary evaluate an application for a new grant?

(a) The Secretary uses the criteria in § 212.55 to evaluate an application.

(b) The Secretary awards up to 100 possible points for these criteria.

(c) The maximum number of points for each criterion is indicated in parentheses.

(Authority: 20 U.S.C. 1070d-2(a) and (e), 2743)

§ 212.55 What selection criteria does the Secretary use in making new grants?

The Secretary uses the criteria in § 212.21 in evaluating an application, except that—

(a) In each place term "LEA" appears, the term is considered to mean "SEA";

(b) The criterion in § 212.21(b) (Percentage of eligible children and parents to be served) does not apply; and

(c) The maximum number of points possible under the criterion in § 212.21(e) (Promise as a model) is 20. These points are distributed as follows: § 212.21(e)(1)—(9 points), § 212.21(e)(2)—(9 points), and § 212.21(e)(3)—(2 points).

(Approved by the Office of Management and Budget under control number 1810-0541)

(Authority: 20 U.S.C. 2743, 2831)

§ 212.56 What additional factors does the Secretary consider in making new grants?

(a) In addition to applying the criteria in §§ 212.21 and 212.55, the Secretary ensures that—

(1) Grants are made to projects that ensure coordination and cooperation between States (or areas of a State) in which participating children and parents reside during the year; and

(2) To the extent possible, grants are distributed equitably among the States in the three migrant streams, as defined in paragraph (c) of this section.

(b) In order to meet the requirements of paragraph (a)(2) of this section, the Secretary—

(1) Separates applications into three groups representing the three migrant streams; and

(2) First awards a grant to the applicant in each stream that is ranked the highest as a result of the process in § 212.54, provided that there is an acceptable application from an SEA or consortium of SEAs in that stream.

(c) For the purposes of this section, the States comprising each stream are the following:

EASTERN STREAM—

Alabama
Connecticut
Delaware
Florida
Georgia
Kentucky
Maine
Maryland
Massachusetts
Mississippi
New Hampshire
New Jersey
New York
North Carolina
Pennsylvania
Puerto Rico
Rhode Island
South Carolina
Tennessee
Vermont
Virginia
West Virginia
District of Columbia

CENTRAL STREAM—

Arkansas
Illinois
Indiana
Iowa
Kansas
Louisiana
Michigan
Minnesota
Missouri
Nebraska
North Dakota
Ohio
Oklahoma
South Dakota
Texas
Wisconsin

WESTERN STREAM—

Alaska
Arizona
California
Colorado
Idaho
Montana
Nevada
New Mexico
Oregon
Utah
Washington
Wyoming
Mariana Islands

(Authority: 20 U.S.C. 2743, 2831)

§ 212.57 What other provisions in this part apply?

(a) In addition to the provisions in this subpart, the following provisions in this part apply to the Migrant Education Even Start program:

(1) § 212.3.

(2) § 212.4.

(3) § 212.5(a), except that the reference to section 1052(a) of the Act is read to be to section 1053(a) of the Act.

(4) § 212.6.

(5) § 212.25, except the references in paragraphs (c) and (d) to § 212.21 and § 212.22(a) are read to refer to § 212.5 and § 212.56 respectively.

(6) § 212.26.

(b) In each place the term "LEA" appears in § 212.4, § 212.5(a), or § 212.26, the term is considered to mean "SEA."

(Authority: 20 U.S.C. 2743)

§ 212.58 May an SEA make a subgrant to an LEA or other operating agency?

Notwithstanding the prohibition of subgrants in 34 CFR 75.708(a), an SEA that receives a grant under the Migrant Education Even Start program may make a subgrant of funds to one or more LEAs or other operating agencies provided that program funds are used as the SEA's approved project application specifies.

(Authority: 20 U.S.C. 2743, 2831)

PART 215—FOLLOW THROUGH PROGRAM

Subpart A—General

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AUTHORITY: 42 U.S.C. 9861-9868.

SOURCE: 52 FR 38853, Oct. 19, 1987, unless otherwise noted.

Subpart A—General

§ 215.1 What is the Follow Through Program?

Follow Through is a program that serves primarily low-income children in kindergarten and primary grades who were previously enrolled in Head Start or similar preschool programs, including other federally assisted preschool programs of a compensatory nature. The goals of the program are to:

(a) Provide comprehensive services that will help these children develop to their full potential;

(b) Achieve active parent participation in the development, conduct, and overall direction of services to these children;

(c) Produce knowledge about innovative educational approaches specifically designed to assist these children in their continued growth and development; and

(d) Demonstrate and disseminate effective Follow Through practices.

(Authority: 42 U.S.C. 9861, 9863)

§ 215.2 What types of grants does the Secretary award?

The Secretary awards two types of Follow Through grants;

(a) Local project grants, including grants for:

(1) Local projects affiliated with a sponsor; and

(2) Self-sponsored local projects.

(b) Sponsor grants.

(Authority: 42 U.S.C. 9861(a), (c), 9863(a), 9866)

§ 215.3 Who is eligible for an award?

(a) *Local Follow Through projects.* (1) Except as provided in paragraph (a)(2) of this section and § 215.33(b), the Secretary awards local Follow Through project grants to local educational agencies (LEAs).

(2) The Secretary may award a grant to another public or appropriate private nonprofit agency, organization, or institution if the Secretary determines it is necessary to include in Follow Through significant numbers of eligible children who are not or cannot be served by an LEA.

(b) *Sponsors.* The Secretary may award Follow Through sponsor grants to:

(1) Institutions of higher education:

(2) Regional educational laboratories; or

(3) Other appropriate public or private nonprofit agencies, organizations, or institutons.

(Authority: 42 U.S.C 9861(a), (b), 9863(a), 9866)

§ 215.4 What does a local Follow Through project do?

(a) Unless the Secretary in particular cases specifies otherwise, a local Follow Through project must include the following components:

(1) An educational component that includes:

(i) Implementation of an innovative educational approach specifically designed to improve the school performance of low-income children in kindergarten and primary grades; and

(ii) Orientation and training for Follow Through staff, parents, and other appropriate personnel.

(2) A parent participation component that provides for:

(i) The active participation of Follow Through parents in the development, conduct, and overall direction of the local project, including activities such as:

(A) Notifying each childs' parents in a timely manner that the child has been selected to participate in Follow Through;

(B) Informing each child's parents of the specific instructional objectives for the child;

(C) Reporting to each child's parents on the child's progress;

(D) Establishing conferences between individual parents and teachers;

(E) Providing materials, suggestions, and training to parents to help them work with their children at home;

(F) Providing timely information concerning the Follow Through Program including, for example, program plans and evaluations;

(G) Soliciting parents' suggestions in the development, conduct, and overall direction of the project;

(H) Consulting with parents about how the school can work with parents to achieve the program's objectives;

(I) Providing timely responses to parents' recommendations; and

(J) Facilitating volunteer or paid participation by parents in the project;

(ii) The establishment of a parent committee to promote active parent participation.

(3) A support services component that provides health, social, nutritional, and other support services to aid the continued development of Follow Through children to their full potential.

(4) A demonstration component that affords opportunities to examine in operation, and to assess the qualities of, effective Follow Through practices for the purpose of encouraging adoption of those practices by other public and private schools having similar educational needs.

(5) For self-sponsored local projects, a dissemination component that provides for the dissemination of effective Follow Through practices to public and private school officials, including:

(i) Encouraging adoption of those effective practices by other public and private schools;

(ii) Providing training and technical assistance to persons interested in adopting the effective practices; and

(iii) Following the progress of the adopted practices.

(b) Except as needed to implement § 215.33, a local Follow Through project must be conducted in only one school, unless the Secretary determines that particular circumstances warrant inclusion of more than one school.

(Authority: 42 U.S.C. 9861(a), (c))

§ 215.5 What does a Follow Through sponsor do?

A Follow Through sponsor shall:

(a) Assist local Follow Through projects affiliated with the sponsor in implementing the innovative educational approach specifically developed by the sponsor to improve the school performance of low-income children in kindergarten and primary grades by:

(1) Providing orientation and training to Follow Through staff, parents, and other appropriate personnel;

(2) Recommending or making available necessary materials;

(3) Helping to identify available public and private resources that can contribute to the development of a comprehensive project;

(4) Monitoring implementation;

(5) Evaluating or participating in the evaluation of the effectiveness of the project; and

(6) Providing additional technical assistance, as appropriate; and

(b) Demonstrate and disseminate effective Follow Through practices to public and private school officials by:

(1) Encouraging adoption of those effective practices by other public and private schools;

(2) Providing training and technical assistance to persons interested in adopting the effective practices; and

(3) Following the progress of the adopted practices.

(Authority: 42 U.S.C. 9863(a), 9866)

§ 215.6 What children may participate in a local Follow Through project?

(a) A local Follow Through project must serve primarily low-income children enrolled in kindergarten and primary grades who have participated in a full-year Head Start or similar preschool program, including other federally assisted preschool programs of a compensatory nature.

(b) To meet the requirement in paragraph (a) of this section, a local project must ensure that at least:

(1) Sixty percent of the children enrolled in the project are from low-income families; and

(2) Sixty percent of the children have had preschool experience as described in paragraph (a) of this section.

(c) Children determined to be low-income at the time they are enrolled in a local Follow Through project may be considered to be low-income for the duration of their participation in the project.

(Authority: 42 U.S.C. 9861(a), (c))

§ 215.7 What regulations apply?

The following regulations apply to the Follow Through Program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of Grants), Part 75 (Direct Grant Programs), Part 77 (Definitions that Apply to Department Regulations), Part 78 (Education Appeal Board), and Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(b) The regulations in this Part 215.

(Authority: 42 U.S.C. 9861-9868)

§ 215.8 What definitions apply?

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
Budget
EDGAR
Elementary school
Equipment
Grant
Grantee
Local educational agency
Materials
Nonprofit
Preschool
Private
Project
Public
Secretary
Supplies

(b) *Other definitions.* The following definitions also apply to this part:

Approach means a coherent, innovative educational strategy—based on one or more theories of child growth and development—that is specifically designed to improve the school performance of low-income children in kindergarten and primary grades. An approach consists of at least:

(1) Classroom or home-based teaching and management practices;

(2) Required or suggested curriculum materials;

(3) Provisions for regular staff training and monitoring; and

(4) Evaluation procedures.

Follow Through children means all children participating in a local Follow Through project.

Follow Through parent means a parent, legal guardian, or other person acting in the place of a parent of a child who is or will be participating in a local Follow Through project.

Follow Through staff means all persons who are employed full- or part-time in a local Follow Through project, whether or not they are paid with Federal Follow Through funds.

Low-income Follow Through children means children participating in a local Follow Through project from families whom the applicant has determined, using the best available data, to be low-income. Examples of data the applicant may use include eligibility under the National School Lunch Program, data on children from families receiving Aid to Families with Dependent Children, or other appropriate measures for determining low-income status.

Primary grades means grades one through three inclusive.

(Authority: 42 U.S.C. 9861-9868)

§ 215.9 [Reserved]

Subpart B—How Does One Apply for an Award?

§ 215.10 How does an applicant apply to operate a local Follow Through project?

An applicant may apply for a grant to operate a local Follow Through project in two ways:

(a) *Joint local project-sponsor application.* A local project applicant shall submit a joint application with a sponsor whose approach the applicant will implement, except that no more than five local project applicants may apply with any sponsor.

(b) *Self-sponsored local project application.* A local project applicant shall submit an application without affiliating with a sponsor if the applicant has developed or implemented an innovative educational approach specifically designed to improve the school performance of low-income children in kindergarten and primary grades.

(Authority: 42 U.S.C. 9861 (a), (c))

§ 215.11 How does an applicant apply to be a Follow Through sponsor?

An applicant for a grant to be a Follow Through sponsor shall submit a joint application with one or more local projects that will implement the innovative educational approach developed by the sponsor, except that a sponsor may apply with no more than five local projects.

(Authority: 42 U.S.C. 9863(a), 9866)

§§ 215.12—215.19 [Reserved]

Subpart C—How Does the Secretary Make an Award?

§ 215.20 How does the Secretary evaluate an application for a Follow Through grant?

(a) *General.* (1) For each type of grant, the Secretary awards up to 100 possible points for the selection criteria in each applicable section of these regulations.

(2) The maximum possible score for each criterion is indicated in parentheses.

(b) *Self-sponsored local project application.* The Secretary uses the criteria in § 215.21 to evaluate each application for a self-sponsored local project.

(c) *Joint local project-sponsor application.* (1) The Secretary uses the criteria in § 215.22 to evaluate each application for a sponsored local project contained in a joint application.

(2) The Secretary uses the criteria in § 215.23 to evaluate the application of the sponsor contained in a joint application.

(3) To obtain a total score for a joint application, the Secretary:

(i) Averages the points awarded to all the local project applicants contained in the joint application; and

(ii) Adds that local project average score to the sponsor's score.

(Authority: 42 U.S.C. 9861 (a), (c), 9863(a), 9866)

§ 215.21 What section criteria does the Secretary use for self-sponsored local Follow Through project applications?

(a) *Educational component.* (25 points) The Secretary reviews each application for a self-sponsored local Follow Through project to determine the effectiveness of the innovative educational approach the applicant has developed or implemented to improve the school performance of low-income children in kindergarten and primary grades. The Secretary also reviews each application for the percentage of low-income children and the percentage of children with preschool experience who will participate in the project.

(b) *Parent participation component.* (20 points) The Secretary reviews each application to determine the quality of the applicant's plan to provide for active participation of Follow Through parents in the development, conduct, and overall direction of project activities.

(c) *Support services component.* (10 points) The Secretary reviews each application to determine the quality of the support services the applicant will provide to Follow Through children.

(d) *Demonstration component.* (10 points) The Secretary reviews each application to determine the quality of the applicant's plan to:

(1) Demonstrate effective practices in the delivery of Follow Through services; and

(2) Provide opportunities for observation of all aspects of the project.

(e) *Dissemination component.* (10 points) The Secretary reviews each application to determine the quality of the applicant's plan to disseminate information about its effective Follow Through practices to public and private school officials, including the extent to which the applicant will:

(1) Encourage adoption of those effective practices by other public and private schools;

(2) Provide training and technical assistance to persons interested in adopting the effective practices; and

(3) Follow the progress of the adopted practices.

(f) *Quality of key personnel.* (5 points) (1) The Secretary reviews each application to determine the quality of the key personnel the applicant plans to use in the project, including:

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel; and

(iii) The time that each person referred to in paragraphs (f)(1)(i) and (ii) of this section will commit to the project.

(2) To determine personnel qualifications under paragraphs (f)(1)(i) and (ii) of this section, the Secretary considers:

(i) Experience and training in fields related to the objectives of the project; and

(ii) Any other qualifications that pertain to the quality of the project.

(g) *Budget and cost-effectiveness.* (5 points) The Secretary reviews each application to determine the extent to which:

(1) The budget is adequate to support the project;

(2) Costs are reasonable in relation to the objectives of the project; and

(3) The applicant provides for the coordination of Follow Through services with existing local resources.

(h) *Evaluation.* (15 points) The Secretary reviews each application to determine the quality of the evaluation plan and any evaluation results to date, including:

(1) Methods of evaluation that are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable; and

(2) The extent to which an applicant's evaluation design meets the standards established in § 215.34.

(Authority: 42 U.S.C. 9861(a), (c), 9865(b))

(Approved by the Office of Management and Budget under control number 1810-0003)

§ 215.22 What selection criteria does the Secretary use for sponsored local Follow Through project applications?

(a) *Educational component.* (25 points) The Secretary reviews each application for a sponsored local Follow Through project contained in a joint application to determine the capability of the applicant to implement a sponsor's approach, including information concerning the applicant's accomplishments to date, where appropriate. The Secretary also reviews each application for the percentage of low-income children and the percentage of children with preschool experience who will participate in the project.

(b) *Parent participation component.* (20 points) The Secretary reviews each application to determine the quality of the applicant's plan to provide for active participation of Follow Through parents in the development, conduct, and overall direction of project activities.

(c) *Support services component.* (10 points) The Secretary reviews each application to determine the quality of the support services the applicant will provide to Follow Through children.

(d) *Demonstration component.* (20 points) The Secretary reviews each application to determine the quality of the applicant's plant to:

(1) Demonstrate effective practices in the delivery of Follow Through services; and

(2) Provide opportunities for observation of all aspects of this project.

(e) *Quality of key personnel.* (5 points) (1) The Secretary reviews each application to determine the quality of the key personnel the applicant plans to use in the project, including:

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel; and

(iii) The time that each person referred to in paragraphs (e)(1)(i) and (ii) of this section will commit to the project.

(2) To determine personnel qualifications under paragraphs (e)(1)(i) and (ii) of this section, the Secretary considers:

(i) Experience and training in fields related to the objectives of the project; and

(ii) Any other qualifications that pertain to the quality of the project.

(f) *Budget and cost-effectiveness.* (5 points) The Secretary reviews each application to determine the extent to which:

(1) The budget is adequate to support the project;

(2) Costs are reasonable in relation to the objectives of the project; and

(3) The applicant provides for the coordination of Follow Through services with existing local resources.

(g) *Evaluation.* (15 points) The Secretary reviews each application to determine the quality of the evaluation plan and any evaluation results to date, including:

(1) Methods of evaluation that are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable; and

(2) The extent to which an applicant's evaluation design meets the standards established in § 215.34.

(Approved by the Office of Management and Budget under control number 1810-0003)

(Authority: 42 U.S.C. 9861(a), (c), 9865(b))

§ 215.23 What selection criteria does the Secretary use for Follow Through sponsor application?

(a) *Educational approach.* (25 points) The Secretary reviews the application for a Follow Through sponsor grant contained in each joint application to determine the effectiveness of the innovative educational approach the applicant has developed to improve the school performance of low-income children in kindergarten and primary grades.

(b) *Implementation assistance.* (20 points) The Secretary reviews each application to determine the quality of the applicant's plan to assist the local projects with which it is affiliated in implementating the applicant's approach, including—

(1) Providing orientation and training to Follow Through staff, parents, and other appropriate personnel;

(2) Recommending or making available necessary materials;

(3) Helping to identify available public and private resources that can contribute to the development of a comprehensive project;

(4) Monitoring implementation; and

(5) Providing additional technical assistance, as appropriate.

(c) *Demonstration and dissemination.* (20 points) The Secretary reviews each application to determine the quality of the applicant's plan to demonstrate and disseminate information about effective Follow Through practices to public and private school officials, including the extent to which the applicant will—

(1) Assist local projects with which it is affiliated in demonstrating effective practices;

(2) Encourage adoption of those effective practices by other public and private schools;

(3) Provide training and technical assistance to persons interested in adopting the effective practices; and

(4) Follow the progress of the adopted practices.

(d) *Quality of key personnel.* (5 points) (1) The Secretary reviews each application to determine the quality of the key personnel the applicant plans to use in the project, including—

(i) The qualifications of the project director,

(ii) The qualifications of each of the other key personnel; and

(iii) The time that each person referred to in paragraphs (d)(1) and (ii) of this section will commit to the project.

(2) To determine personnel qualifications under paragraphs (d)(1) (i) and (ii) of this section, the Secretary considers—

(i) Experience and training in fields related to the objectives of the project; and

(ii) Any other qualifications that pertain to the quality of the project.

(e) *Budget and cost-effectiveness.* (5 points) The Secretary reviews each application to determine the extent to which—

(1) The budget is adequate to support the project; and

(2) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation.* (25 points) The Secretary reviews each application to determine the quality of the evaluation plan and any evaluation results to date, including—

(1) Methods of evaluation that are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable; and

(2) The extent to which an applicant's evaluation design meets the standards established in § 215.34.

(Approved by the Office of Management and Budget under control number 1810-0002)

(Authority: 42 U.S.C. 9863(a), 9865(b), 9866)

§ 215.24 What other factors does the Secretary consider in awarding a Follow Through grant?

(a) The Secretary prepares separate rank orderings of the self-sponsored local project applications and the joint local project-sponsor applications.

(b) From the funds appropriated for Follow Through, the Secretary determines the amount of funds available for self-sponsored local project applications and the amount available for joint local project-sponsor applications.

(c) The Secretary awards a grant to a local project—both self-sponsored and sponsored—only if the applicant:

(1) Obtains a rating of at least 70 points; and

(2) Meets the requirements in § 215.4(a).

(d) Under a joint local project-sponsor application, the Secretary:

(1) Awards a grant to a sponsor only if a grant will be made to at least one local project that will implement the sponsor's approach; and

(2) Does not award a grant to any local project applicant included in the joint application, even if the local project applicant scores 70 points or more, if the joint application does not rank sufficiently high to receive funding.

(Authority: 42 U.S.C. 9861, 9863, 9866)

§§ 215.25—215.29 [Reserved]

Subpart D—What Conditions Must be Met by a Grantee?

§ 215.30 What program requirements must a local project grantee meet?

In addition to implementing the components listed in § 215.4(a), a local Follow Through project grantee shall meet the following program requirements:

(a) *Project director.* A local project grantee shall appoint a full- or part-time director to be responsible for overall program management.

(b) *Employment of personnel.* In the hiring of personnel, a local project grantee shall, to the maximum extent feasible, give preference to the following:

(1) Low-income Follow Through parents.

(2) Other residents of the area served by the project.

(Authority: 42 U.S.C 9861 (a), (c), 9867(a))

§ 215.31 What program requirements must a sponsor meet?

A Follow Through sponsor shall meet the following program requirements:

(a) *Responsibilities.* A sponsor shall perform, at a minimum, the activities listed in § 215.5.

(b) *Project director.* A sponsor shall appoint a full- or part-time director to be responsible for overall program management.

(Authority: 42 U.S.C. 9863(a), 9866)

§ 215.32 What fiscal requirements must a local project grantee meet?

(a) *Prohibition against supplanting.* (1) A local project grantee shall use Follow Through funds for services that are in addition to, and not in substitution for, services previously provided without Federal assistance.

(2) To meet the requirements in paragraph (a)(1) of this section, a local project grantee shall contribute for the education of the children participating in the Follow Through project, at a minimum, the level of funds that would, in the absence of Follow Through funds, be made available

from non-Federal sources for the education of those children.

(b) *Federal share.* (1) Unless a local project meets the criteria in paragraph (b)(2) of this section, a local project grantee may not use Follow Through funds to pay for more than 80 percent of the total approved costs of Follow Through services and activities.

(2) The Secretary may approve the use of Follow Through funds to pay for more than 80 percent of the total approved costs of the project if the Secretary determines that:

(i) The local grantee has made a reasonable effort to meet its non-Federal share requirement; and

(ii)(A) The project serves an area in which the per capita personal income is equal to or less than one-half of the current poverty income guideline, for a family unit of four members, published by the Department of Health and Human Services in the FEDERAL REGISTER.

(B) The project serves an area that has been involved in a major disaster; or

(C) The project serves an area that has been affected by unusual circumstances that have significantly reduced the financial or human resources that would otherwise be available as non-Federal share.

(Authority: 42 U.S.C. 9862 (b), (c))

§ 215.33 What are the requirements for participation of private school children?

(a) A local Follow Through project grantee shall provide for participation of eligible students enrolled in private nonprofit elementary schools.

(b) If an LEA is unable or unwilling to include in its local project eligible children enrolled in private nonprofit elementary schools, the Secretary may provide financial assistance to any other public or appropriate private nonprofit agency, organization, or institution for the purpose of serving those children.

(Authority: 42 U.S.C. 9861 (a), (b))

§ 215.34 What evaluation requirements apply to a grantee?

(a) A grantee's evaluation must comply with the following requirements:

(1) A grantee's evaluation design must include objective measures of the educational progress of project participants when measured against an appropriate nonproject comparison group. These measures should include performance on standardized testing instruments, grade retention, truancy, or referral to or placement in special education.

(2) A grantee's evaluation design must meet the following technical standards:

(i) *Representativeness of evaluation findings.* The evaluation results must be computed so that the conclusions apply to the persons, schools, or agencies served by the projects.

(ii) *Reliability and validity of evaluation instruments and procedures.* The evaluation procedures must minimize error by providing for proper administration of the evaluation instruments, at twelve-month testing intervals, accurate scoring and transcription of results, and the use of analysis and reporting procedures that are appropriate for the data obtained from the evaluation.

(b) A grantee shall modify the project, if necessary, as a result of the evaluation of the project.

(Authority: 42 U.S.C. 9865(b))

§§ 215.35—215.39 [Reserved]

Subpart E—What Compliance Procedures May the Secretary Use?

§ 215.40 What procedure does the Secretary use before terminating a grant?

The Secretary does not terminate Follow Through funds for a grantee's failure to comply with applicable terms and conditions unless the Secretary has afforded the grantee reasonable notice and an opportunity for a hearing under 34 CFR Part 78 (Education Appeal Board).

(Authority: 42 U.S.C. 9867(b))

§§ 215.41—215.49 [Reserved]

PART 218—HEARINGS IN CONNECTION WITH SCHOOL CONSTRUCTION AND FINANCIAL ASSISTANCE IN FEDERALLY IMPACTED AREAS

Sec.

218.1 Definitions.
218.2 Opportunity for hearing.
218.3 Procedure in requesting hearing.
218.4 Reconsideration after request or order for hearing.
218.5 Time and place of hearing.
218.6 Right to counsel.
218.7 Procedures, evidence, and record.
218.8 Decisions and notices.
218.9 Decisions on record or review by Secretary.
218.10 Other determinations not affected by this part.

AUTHORITY: Secs. 208, 7, 64 Stat. 975, 1107, secs. 101, 201, 209, 1, 9, 64 Stat. 967, 1100, sec. 301, 67 Stat. 522; 20 U.S.C. 631-645, 236-242, 244.

SOURCE: 18 FR 6707, Oct. 22, 1953, unless otherwise noted. Redesignated at 35 FR 256, Jan. 7, 1970, and 45 FR 77368, Nov. 21, 1980.

§ 218.1 Definitions.

Terms defined in Pub. L. 815, 81st Congress (64 Stat. 967), as amended, and Pub. L. 874, 81st Congress (64 Stat. 1100), as amended, and not defined in this section shall have the meaning given such terms in such public laws. As used in this part, the following terms shall have the meaning indicated in paragraphs (a) to (e) of this section:

(a) [Reserved]

(b) *Pub. L. 815.* "Pub. L. 815" means Public Law 815, 81st Congress (64 Stat. 967), as amended.

(c) *Pub. L. 874.* "Pub. L. 874" means Public Law 874, 81st Congress (64 Stat. 1100), as amended.

[24 FR 3880, May 14, 1959. Redesignated at 35 FR 256, Jan. 7, 1970, and amended at 38 FR 30658, Nov. 9, 1973, and further redesignated at 45 FR 77368, Nov. 21, 1980]

§ 218.2 Opportunity for hearing.

(a) Any applicant whose application under Pub. L. 815 or Pub. L. 874 is disapproved by the Secretary, or his delegatee, in whole or in part, or which is dissatisfied with the Secretary's action, or failure to act (or that of his delegatee), upon its application under such public laws shall be entitled to a hearing thereon.

(b) A hearing shall be given to an applicant dissatisfied with an adverse administrative action of the Secretary (or of his delegatee) with respect to its application only (1) if a written request for such a hearing with respect to such action is filed with the Secretary within 60 days of notice to the applicant of such action; and (2) if the action at issue is material to the determination of the applicant's rights and is not committed wholly to the discretion of the Secretary. The time within which such a request for hearing must be filed will not be extended by a request for reconsideration or by reconsideration by the Secretary on his own motion, unless the time for filing such request is extended in writing by the Secretary.

(c) In the event the Secretary has reason to believe that further payments to an applicant under Pub. L. 815 should be withheld by reason of the failure of the applicant to comply with the conditions of such law, he shall so notify the applicant. Such notice, a copy of which shall likewise be sent to the State educational agency, shall either (1) advise the applicant of the specific provision under which the Secretary's action is taken and the basis for his belief and fix a date not less than 20 days, nor more than 60 days, after the date of such notice within which the applicant may request that the matter be scheduled for hearing in due course; or (2) advise the applicant that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be subject to change for cause. The failure of an applicant without the consent of the Secretary to request a hearing under paragraph (c)(1) of this section or to appear at a hearing for which a date has been set, shall be deemed to be a waiver of the right to a hearing under this subsection and consent to the Secretary making a decision on the basis of such information as is available to him.

[18 FR 6707, Oct. 22, 1953, as amended at 24 FR 3880, May 14, 1959. Redesignated at 35 FR 256, Jan. 7, 1970, and further redesignated at 45 FR 77368, Nov. 21, 1980]

§ 218.3 Procedure in requesting hearing.

A request by an applicant for a hearing in accordance with this part must be addressed to the Secretary and must clearly specify in writing the issues of fact and law to be considered, and, where the applicant is not a State agency, a copy of such request should be furnished to the State educational agency by the applicant.

§ 218.4 Reconsideration after request or order for hearing.

The request for a hearing, or the fact that any matter or issue has been scheduled for hearing, under this part, shall not prejudice any request for reconsideration of any determination made by the Secretary or his delegatee, but the pendency of any such request for reconsideration shall not constitute a basis upon which postponement of the hearing can be demanded as of right by the applicant or by the Secretary.

§ 218.5 Time and place of hearing.

Hearings on any matter included in § 218.2 shall be held at the offices of the Department in Washington, D.C., at a time fixed by the Secretary, unless the Secretary determines that the convenience of the applicant or of the Department requires that another place be selected.

§ 218.6 Right to counsel.

In all proceedings under this part, the applicant and the Secretary shall have the right to be represented by proper counsel.

§ 218.7 Procedures, evidence, and record.

(a) The hearing officer shall conduct the hearing and shall issue such rules of procedure as are proper (and not inconsistent with this part) relating to the conduct of the hearing, giving of notices subsequent to those provided for in § 218.5, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. The application in question and all relevant amendments and exhibits submitted therewith shall be made a part of the hearing record. Both the Department and the applicant shall be entitled to introduce all relevant evidence on the issues as stated in the notice or request for hearing or as determined by the hearing officer at the outset of or during the hearing.

(b) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination or by other means shall be applied by the hearing officer where reasonably necessary. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence unless dispensed with by stipulation. All decisions shall be based upon the hearing record and written findings shall be made.

§ 218.8 Decisions and notices.

If the hearing is held by a person other than the Secretary, such person shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the Secretary for a final decision, and written notice of such initial decision or certification shall be mailed to the applicant. Where the initial decision is made by the hearing officer, and in the absence of either an appeal to the Secretary or review upon motion of the Secretary within time limits stated in this section, such decision shall without further proceedings constitute the final decision of the Secretary. The applicant may within thirty days of the mailing of such notice of initial decision request the Secretary to review it. The Secretary may grant or deny such request or may within forty-five days after the initial decision review it on his own motion. Written notice of the Secretary's action granting or denying a request for review or of his determination to review it on his own motion shall be mailed promptly to the applicant.

§ 218.9 Decisions on record or review by Secretary.

Whenever a record is certified to the Secretary for decision or the Secretary determines to review the decision of another person pursuant to § 218.8, or whenever the Secretary conducts the hearing, the applicant shall be given reasonable opportunity to file with the Secretary briefs or other written statements of its contentions, and the final decision of the Secretary in such cases promptly shall be given in writing to the applicant.

§ 218.10 Other determinations not affected by this part.

Nothing in this part shall be construed to bar the Secretary reconsidering any determination under Pub. L. 815 and 874 unless such determination has been the subject of a hearing under this part.

PART 219—ASSISTANCE FOR SCHOOL EXPENDITURES AND CONSTRUCTION IN CASES OF CERTAIN DISASTERS

Subpart A—General

Sec.

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219.11 Replacement of instructional and maintenance supplies, equipment, and materials.
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219.31 Review of an application: Consideration of other resources available to an applicant.
219.32 Consultation with the State educational agency.
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Subpart E—Eligible Costs

219.41 Eligible costs for assistance related to replacement of instructional and maintenance supplies, equipment, and materials; minor repairs; or provision of temporary school facilities (Section 7(b) of Pub. L. 81-874).
219.42 Eligible costs for restoration or replacement of school facilities (Section 16 of Pub. L. 81-815).

Subpart F—Hearings

219.51 Hearings relating to assistance for restoration or replacement of school facilities (Section 16 of Pub. L. 81-815).
219.52 Hearings relating to assistance other than restoration or replacement of school facilities (Sections 7(a) and 7(b) of Pub. L. 81-874).

AUTHORITY: 20 U.S.C. 241-1 and 646, unless otherwise noted.

SOURCE: 47 FR 3329, Jan. 22, 1982, unless otherwise noted.

Subpart A—General

§ 219.1 Disaster assistance program.

(a) *Purpose.* Under this program the Department of Education provides financial assistance to local educational agencies (LEAs) that have been afflicted by certain disasters. This assistance is authorized by section 7 of Pub. L. 81-874 (Financial Assistance for Local Educational Agencies in Areas Affected by Federal Activity) and by Section 16 of Pub. L. 81-815 (School Construction in Areas Affected by Federal Activities). These two laws are referred to in this part as "the Acts." Assistance may include:

(1) Replacement of instructional and maintenance supplies, equipment, and materials;

(2) Payment for minor repairs;

(3) Provision of needed temporary facilities not including the acquisition of land or the erection of facilities;

(4) Additional assistance necessary to provide free public education, such as payment of increased current operating expenses and replacement of lost revenues; and

(5) Restoration or replacement of seriously damaged or destroyed school facilities.

(b) *Limits on assistance.* Assistance is limited to a reasonable amount of an LEA's expenses resulting from the disaster. The Secretary of Education determines the allowable amount of assistance after considering other resources available to the LEA.

(Authority: 20 U.S.C. 241-1 (a), (b), 646(a))

§ 219.2 Eligible parties.

An LEA may apply for assistance if it meets these conditions:

(a) *Occurrence of a disaster.* The President declares a major disaster encompassing an area in which part or all of the LEA is located.

(b) *Financial need.* As a result of the disaster, and in order to provide free public education to the children it serves, the LEA requires assistance of at least:

(1) $10,000; or

(2) Five percent of its current operating expenses for the fiscal year preceding the fiscal year in which the disaster occurred, whichever is less.

(Authority: 20 U.S.C. 241-1 (a), (b), 646(a))

[47 FR 3329, Jan. 22, 1982, as amended at 53 FR 39019, Oct. 4, 1988]

§ 219.3 Regulations that apply to the disaster assistance program.

The following regulations apply to the disaster assistance program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 75 (Direct Grant Programs) and Part 77 (Definitions); except for these sections of EDGAR that do not apply to this program:

(1) 34 CFR 75.113 (Describe the key personnel).

(2) 34 CFR 75.115 (Describe the evaluation plan).

(3) 34 CFR 75.217-75.222 (Discretionary grant selection procedures).

(4) 34 CFR 75.603 (Grantee's title to site).

(b) General Regulations for Administration of Grants (34 CFR Part 74), which are incorporated by reference in EDGAR, except for these sections of Part 74 that do not apply to this program:

(1) 34 CFR 74.94 (Payment methods under construction grants).

(2) Subpart O (Property).

(c) The regulations in this Part 219.

§ 219.4 Definitions.

(a) *Terms defined in EDGAR.* (1) The following terms used in this part are defined in 34 CFR Part 77:

Applicant
Application
Award
EDGAR
Project
Secretary

(2) The following terms used in this part are defined in General Regulations for Administration of Grants (34 CFR Part 74), which are incorporated by reference in EDGAR:

Grant
Grantee
Supplies

(b) *Terms defined by statute.* The following terms used in this part are defined in the Acts:

Child
Construct, Constructing, Construction
Equipment
Free public education
Local educational agency (LEA)
School facilities
State
State educational agency (SEA)

(c) *Terms defined in this part.* As used in this part, these terms have the following definitions:

"Acts" means Pub. L. 815, 81st Congress (64 Stat. 967), as amended, and Pub. L. 874, 81st Congress (64 Stat. 1100), as amended.

(Authority: 20 U.S.C. 236-244, 631-647)

"Latent damages" means damages that are caused by a disaster but that become apparent only after an LEA has applied for a grant.

(Authority: 20 U.S.C. 241-1(a), (b), 646(a))

"Major disaster" means a disaster the President determines to be, or threatens to be, of sufficient severity and magnitude to warrant Federal disaster assistance. The disaster may result from flood, drought, fire, hurricane, earthquake, storm, or from some other catastrophe.

(Authority: 20 U.S.C. 241-1(a)(1)(A), 646(a)(1)(A))

"Membership" means:

(1) The number of children in the membership of a school according to State law; or

(2) If no State law governs membership, the number of children who are listed on the school's current roll of pupils and who have not permanently left the school or become otherwise ineligible to attend classes there.

(3) An exception to the general rule stated in paragraphs (a) and (b) of this section applies if a child resides in the district of one LEA but attends school in the district of another under a tuition arrangement in which the LEA in whose district the child resides reimburses the other LEA. In these cases the child is considered to be a member in the LEA in which the child resides, unless the Secretary approves an agreement between the LEAs that the child will be recorded as a member in the LEA in which it attends school.

(Authority: 20 U.S.C. 645(5))

"Minimum school facilities" means those facilities that the Secretary, after consultation with the SEA and LEA, considers necessary for an LEA's educational mission and for which Federal assistance may be provided. Generally, these are facilities—such as classrooms, auxiliary rooms, and initial equipment, machinery, and utilities—that support an educational program for the LEA's membership at normal capacity and in accordance with the laws and common practice in the State.

(Authority: 20 U.S.C. 645(9), (10))

"Normal capacity" means the number of pupils that a school facility accommodates under ordinary conditions according to the laws and common practice of the State.

(Authority: 20 U.S.C. 634, 645(9), (10))

[47 FR 3329, Jan. 22, 1982, as amended at 53 FR 39019, Oct. 4, 1988]

Subpart B—Kinds of Projects Assisted Under This Program

§ 219.11 Replacement of instructional and maintenance supplies, equipment, and materials.

The Secretary may authorize assistance to replace instructional and maintenance supplies, equipment, and materials—including text-books—that have been seriously damaged or destroyed as a result of a disaster (Sec. 7(b) of Pub. L. 81-874).

(Authority: 20 U.S.C. 241-1(b))

§ 219.12 Payment for minor repairs.

The Secretary may authorize assistance for payment for minor repairs (Section 7(b) of Pub. L. 81-874).

(a) *Repair of school facilities.* Repair of a school facility is considered minor if the repair:

(1) Relates to an architectural, mechanical, or structural element of the facility, or to its site, grading, or surrounding improvements;

(2) Restores a portion of the facility to a condition similar to its condition before the disaster; and

(3)(i) Replaces no more than 30 percent of any one major structural element, such as a load-bearing wall or roof truss, that supports the weight of the facility; or

(ii) Replaces more than 30 percent of a major structural element but has a total cost of no more than $100,000.

(b) *Use of funds for construction.* (1) An LEA may choose to apply grant funds available for minor repairs to a damaged school facility to the razing of that facility and the construction of a new facility similar to the damaged facility.

(2) The LEA must pay all additional costs associated with its choice to construct a new facility rather than to repair the damaged facility.

(c) *Repair of equipment and materials.* (1) Repair of equipment and materials is considered minor if the repair costs less than replacement of the equipment and materials.

(2)(i) Unless the following exception applies, an LEA must repair rather than replace damaged equipment and materials if this repair is minor.

(ii) Exception: an LEA may choose to apply grant funds available for minor repairs to damaged equipment and materials to the purchase of new equipment and materials if the LEA pays all additional costs associated with that choice.

(Authority: 20 U.S.C. 241-1(b), 244(13), (14))

§ 219.13 Provision of needed temporary school facilities.

The Secretary may authorize assistance for the provision of needed temporary school facilities (section 7(b) of Pub. L. 81-874).

(a) *Means of furnishing temporary school facilities.* Assistance may include the cost of—

(1) Purchasing equipment necessary to operate temporary facilities;

(2) Converting remaining portions of school facilities into classrooms and cafeteria facilities;

(3) A lease on temporary alternative school facilities for a period of time necessary to repair, restore, or replace permanent school facilities; or

(4) Lease or purchase, whichever cost is less, of temporary portable school facilities for a period of time necessary to repair, restore, or replace permanent school facilities if conversion of remaining facilities or lease of temporary alternative facilities is not practical.

(b) *Prohibition of permanent arrangements.* Assistance may not include the acquisition of land or the erection of facilities.

(Authority: 20 U.S.C. 241-1(b))

§ 219.14 Payment of increased current operating expenses and replacement of lost revenues.

The Secretary may authorize assistance necessary to provide free public education, such as payment for increased current operating expenses and replacement of lost revenues (section 7(a) of Pub. L. 81-874).

(a) *Limits on assistance.* Assistance may not exceed an amount necessary to permit an LEA to provide a level of education equivalent to that maintained in its schools before the disaster.

(b) *Prohibition of unrelated expenses.* Assistance may not include—

(1) Elimination from the LEA's budget of a deficit balance preceding the disaster; or

(2) Creation for the LEA's budget of a carryover balance following the disaster.

(c) *Five years is the maximum period of assistance.* The Secretary provides assistance—for operating expenses or replacement of lost revenues—for no more than five consecutive fiscal years, beginning with the fiscal year in which the disaster is declared.

(d) *Diminishing amount of assistance available during the five-year period.* The maximum amount of assistance for which an LEA is eligible to apply diminishes during the five-year eligibility period as follows:

(1) Year of disaster—100 percent of eligible expenses.

(2) First year following disaster—100 percent of eligible expenses.

(3) Second year following disaster—75 percent of the amount provided in the first year following the disaster.

(4) Third year following disaster—50 percent of the amount provided in the first year following the disaster.

(5) Fourth year following disaster—25 percent of the amount provided in the first year following the disaster.

(e) *Private school children displaced by a major disaster.* (1) If a private school has been disrupted or impaired by a major disaster, assistance to an LEA may include an amount necessary to provide educational programs in which displaced children previously enrolled in the private school may attend and participate.

(2)(i) These programs must be under public auspices and administration.

(ii) No assistance is furnished for religious worship or instruction.

(Authority: 20 U.S.C. 241-1(a))

§ 219.15 Restoration or replacement of school facilities.

(a) *Restoration or replacement.* The Secretary may authorize assistance for the restoration or replacement of seriously damaged or destroyed minimum school facilities (section 16 of Pub. L. 81-815).

(b) *Serious damage.* A school facility is considered to be seriously damaged if—

(1) It is necessary to restore or replace more than 30 percent of a major structural element, such as a load-bearing wall or roof truss, that supports the weight of the facility; and

(2) This restoration or replacement costs more than $100,000.

(c) *Limits on assistance.* Assistance is limited to those facilities that are necessary to operate a program of free public education for an LEA's membership at normal capacity in accordance with the laws and common practice of the State and, that prior to the disaster, were either:

(1) In use by the LEA; or

(2) Being constructed by the LEA.

(d) *Facilities for private school children displaced by a major disaster.* (1) In the case of a major disaster, minimum school facilities also include facilities necessary to serve displaced children previously enrolled in private school facilities that have been destroyed by the disaster and will not be replaced.

(2)(i) The LEA must be providing these children with educational programs they may attend and in which they may participate.

(ii) These programs must be under public auspices and administration.

(iii) No assistance is furnished for religious worship or instruction.

(Authority: 20 U.S.C. 241-1(a), 646(a))

(e) *Damaged facilities.* For facilities seriously damaged but not destroyed, assistance is limited to the lesser of:

(1) The cost of restoring the facility; or

(2) The cost of replacing the facility.

(f) *Destroyed facilities.* For facilities that have been destroyed, assistance is limited to the lesser of:

(1) The cost of replacing the facility on the same site; or

(2) The cost of replacing the facility on another appropriate site.

(Authority: 20 U.S.C. 646(a))

(g) *Excellence of architecture and design.* An LEA that restores or replaces a minimum school facility shall give appropriate consideration to excellence of architecture and design.

(Authority: 20 U.S.C. 645(10)(A))

(h) *Access and use by handicapped persons.* An LEA that restores or replaces a minimum school facility shall ensure that all facilities constructed with assistance under this program provide appropriate access and use by handicapped persons.

(Authority: 20 U.S.C. 645(10)(C))

NOTE: Additional rules for determining the types of facilities that may be considered "minumum school facilities" are contained in § 219.42 of these regulations (Eligible costs for restoration or replacement of school facilities (Section 16 of Pub. L. 81-815)).

Subpart C—How To Apply for Assistance

§ 219.21 Application procedure.

(a) *Application requirement.* To be considered for assistance an LEA must file an application with the Secretary through its State educational agency (SEA).

NOTE: Upon request, the Secretary supplies an LEA with an application and instructions for properly completing the application.

(b) *State certification: Closing date for filing.* The LEA shall submit its application to the SEA. The LEA shall ensure that the SEA certifies and transmits this material to the Secretary on or before a date 90 days after the date of publication of a notice in the FEDERAL REGISTER that the President has declared a major disaster.

(c) *Change in information included in the application.* The LEA shall promptly inform the Secretary of any change in the information included in its application that would affect eligibility for assistance or the amount of a grant.

(d) *New application each year in certain cases.* In order to receive continuing assistance for payment of current operating expenses or replacement of lost revenues (Section 7(a) of Pub. L. 81-874), the LEA shall file a new application during—and for each—of the fiscal years following the initial application.

(Authority: 20 U.S.C. 241-1(d), 636 (a), (b), 646(c))

[47 FR 3329, Jan. 22, 1982, as amended at 53 FR 39019, Oct. 4, 1988]

§ 219.22 State certification of applications.

The SEA's certification of an application related to a major disaster shall contain the following assurances on the authority of the Governor unless the Governor has previously filed these assurances with the Federal Emergency Management Agency:

(a Assurance that the LEA is located in an area declared by the President as a major disaster area.

(b) Assurance of the LEA's need for Federal disaster assistance.

(c) Assurance that the State or one or more of its political subdivisions will expend an amount of funds the Secretary considers reasonable to assist the LEA.

(Authority: 20 U.S.C. 241-1(a), (d), 646(a), (c))

[47 FR 3329, Jan. 22, 1982, as amended at 53 FR 39019, Oct. 4, 1988; 54 FR 43584, Oct. 26, 1989]

Subpart D—How a Grant Is Made

§ 219.31 Review of an application: Consideration of other resources available to an applicant.

(a) *Review of application.* The Secretary reviews a properly completed application and considers other resources available to an applicant in order to determine the applicant's eligibility for assistance and the amount of assistance that would be reasonable.

(b) *Resources to be considered.* Other resources available to the applicant include, but are not limited to:

(1) State assistance;

(2) Local assistance;

(3) Federal assistance in addition to that provided under this program;

(4) Insurance proceeds; and

(5) Interest earned on resources listed in paragraph (a)(1) through (4) of this section.

(c) *Special rule in certain cases.* Other resources available to an applicant for assistance related to restoration or replacement of minimum school facilities (Section 16 of Pub. L. 81-815) also include:

(1) The proceeds of bonds voted specifically for restoration or replacement of a destroyed or seriously damaged facility; and

(2) The greater of:

(i) An amount the State requires an LEA to set aside in a related insurance program or mandatory reserve fund; or

(ii) All unobligated or unencumbered non-Federal funds that the Secretary determines have been set aside by the LEA in a related insurance program, monetary reserve fund, or other comparable fund.

(Authority: 20 U.S.C. 241-1(a)(3), 646(a)(4)(5))

§ 219.32 Consultation with the State educational agency.

An application for assistance related to restoration or replacement of minimum school facilities (Section 16 of Pub. L. 81-815) is approved only if the Secretary, after consultation with the SEA, determines that the restoration or replacement:

(a) Relates exclusively to minimum school facilities; and

(b) Is not inconsistent with overall State plans respecting construction of school facilities.

(Authority: 20 U.S.C. 645(10), 646(c))

§ 219.33 Determination of priorities among eligible applications.

(a) *General.* the Secretary funds eligible applications from appropriations provided by the Congress under the two respective Acts that authorize the program—Pub. L. 81-815 and Pub. L. 81-874. This results in these two separate appropriations:

(1) Funds that may be used for eligible applications that relate to the restoration or replacement of minimum school facilities (Pub. L. 81-815).

(2) Funds that may be used for all other eligible applications (Pub. L. 81-874).

NOTE: In certain cases, Congress appropriates funds that may be used to fund only certain types of eligible applications. For example, in recent fiscal years, Congress has appropriated funds for LEAs damaged by major disasters but has not appropriated funds for LEAs damaged by pinpoint disasters.

(b) *Funding of eligible applications.* Normally, the Secretary awards a grant to each application of a type for which Congress has appropriated funds as soon as the Secretary determines the application is eligible for payment. However, if the funds Congress appropriates are insufficient to fund all of a number of applications that are potentially eligible, the Secretary awards as many grants as possible according to the priorities described in this section.

(Authority: 20 U.S.C. 646(c), 241-1(d))

(c) *Priorities for applications related to restoration or replacement of school facilities.* If the amount of funds appropriated for eligible applications that relate to restoration or replacement of minimum school facilities is insufficient to permit the award of a grant to all these applications, the Secretary awards as many grants as possible in the following order of priority:

(1) *Applications for situations in which students must be relocated.* First the Secretary funds those applications that relate to situations in which an LEA must relocate students because of a disaster.

(i) The Secretary determines relative priority among these applications by computing for each application the following percentage, then ranking applications in descending order of priority from the highest to the lowest computed percent:

$$\frac{\text{Number of students requiring relocation}}{\text{LEA's total current membership}}$$

(ii) If an application relates to a major disaster as a result of which private school students require relocation, the percentage in paragraph (c)(1)(i) of this section is computed by including these students both in the number of students requiring relocation and in the LEA's total current membership.

(2) *Applications for situations in which it is unnecessary to relocate students.* After the Secretary funds applications requiring the relocation of students, the Secretary funds remaining applications. The Secretary determines relative priority among these remaining applications by computing for each application the following percentage, then ranking applications in descending order of priority from the highest to the lowest computed percent:

$$\frac{\text{Estimated Federal assistance required for the project described in the application}}{\text{Estimated unused bond capacity of the LEA on the date of the disaster}}$$

(If the LEA's bond capacity is not limited by statute, the Secretary considers this capacity to be limited to 12 percent of the LEA's assessed valuation of real property)

(Authority: 20 U.S.C. 646(c))

(d) *Priorities for applications not related to restoration or replacement of school facilities.* If the amount of funds appropriated for eligible applications that do not relate to restoration or replacement of minimum school facilities is insufficient to permit the award of a grant to all these applications, the Secretary awards as many grants as possible in the order of priority established by this method:

(1) The Secretary computes for each application the following percentage:

$$\frac{\text{Estimated Federal assistance required for the project described in the application}}{\text{The LEA's current operating expenses for the fiscal year preceding the disaster}}$$

(2) Applications are then ranked in descending order of priority from the highest to the lowest computed percent.

(Authority: 20 U.S.C. 241-1(d))

Subpart E—Eligible Costs

§ 219.41 Eligible costs for assistance related to replacement of instructional and maintenance supplies, equipment, and materials; minor repairs; or provision of temporary school facilities (Section 7(b) of Pub. L. 81–874).

(a) *Secretary's approval.* A grantee may apply grant funds only to:

(1) Costs that the Secretary approves in advance; or

(2) Costs that the Secretary approves retroactively because they were necessarily incurred as emergency measures immediately prior to, during, or subsequent to a disaster.

(b) *Eligible costs.* Among the costs the Secretary approves as eligible for payment are reasonable costs related to the following items:

(1) *Preventive work.* Preventive work done on or immediately adjacent to a school site in anticipation of or during the disaster, if the work could reasonably have been expected to minimize damage.

(2) *Work performed by a grantee's maintenance employees.* Work must be related to the disaster and performed by a grantee's maintenance employees in addition to—not in place of—their regular duties.

(3) *Installation of utilities.* Installation costs for utilities in temporary or leased facilities.

(4) *Replacement of equipment.* (i) Assistance in replacing movable equipment—including vehicles—if the equipment, when purchased, was essential to school operations, and if it would cost more to repair the equipment than to replace it.

(ii) If a school bus is being replaced, the Secretary determines the amount of assistance by deducting from the cost of replacement the salvage value of the bus and any available insurance proceeds and State transportation assistance.

(5) *Off-site work.* Off-site work to permit emergency access to damaged school facilities, if the work is consistent with State law and is not the responsibility of another unit of local government.

(6) *Trees, shrubs, and ground cover.* Replacement of trees and shrubs by the size of plantings customarily made on the site of new school facilities in the State, and of ground cover by seeding, unless sod is the only effective replacement.

(7) *Architectural and engineering fees.* Architectural and engineering fees that relate to a repair or replacement authorized by the program.

(8) *Repair of school facilities under construction or renovation and of those that are temporary or obsolete.* (i) Repair of school facilities that, at the time of the disaster, were under construction or revnovation, if the cost of repair is not covered by insurance.

(ii) Temporary or obsolete facilities may be repaired unless prior to the disaster the LEA took formal action to replace them.

(9) *Repair of school facilities damaged during disaster recovery.* Repair of school facilities necessarily damaged during disaster recovery activities to reestablish school operations.

(10) *Temporary facilities.* Provision of temporary facilities, including the purchase of necessary operating equipment.

(11) *Insurance on temporary portable classroom units that are purchased by the grantee.*

(12) *Necessary demolition of facilities and removal of debris.*

(13) *Emergency repairs to prevent further damage to a facility or to make it immediately available for education.*

(Authority: 20 U.S.C. 241-1(a)(b))

(c) *Ineligible costs.* The Secretary does not approve any costs related to the following:

(1) Acquisition of land.

(2) A gymnasium, stadium, or similar facility primarily intended for events that include an admission charge to the general public.

(3) Latent damages not reported to the Secretary within six months of the date the Secretary receives the LEA's application.

(Authority: 20 U.S.C. 241-1(b), 244(13))

(d) *Effect of insurance coverage.* (1) Eligible costs include only the amount of the LEA's expenses that exceeds any insurance proceeds on the damaged or destroyed supplies, equipment, materials, and facilities.

(2) A grantee shall prosecute insurance claims promptly and fully.

(Authority: 20 U.S.C. 241-1(a)(b))

§ 219.42 Eligible costs for restoration or replacement of school facilities (Section 16 of Pub. L. 81-815).

(a) *Secretary's approval.* A grantee may apply grant funds only to items described in its project application that the Secretary approves as eligible for payment.

(b) *Eligible costs.* (1) The Secretary approves reasonable costs to restore or replace any of the following minimum school facilities to a condition similar to that before the disaster:

(i) Classrooms and related facilities.

(ii) Fixed equipment, machinery, and utilities.

(iii)(A) An auditorium or gymnasium or both if it is justified by the size and educational program of the LEA and by standards and practices in the State.

(B) The capacity of the facility may exceed the membership of the school only if the LEA pays all additional costs associated with the increased capacity.

(iv) Air conditioning if it is justified by standards and practices in the State.

(2) The Secretary also approves reasonable costs related to the following items:

(i) Works of art—if their cost does not exceed one percent of a project's cost.

(ii) Design features that provide appropriate access and use by handicapped persons.

(iii) Design features that afford appropriate protection against personal injuries from future disasters.

(c) *Ineligible costs.* The Secretary does not approve any costs related to:

(1) Purchase of an interest in land;

(2) Off-site improvements;

(3) A gymnasium, stadium, or similar facility primarily intended for events that include an admission charge to the general public; or

(4) Emergency repairs to prevent further damage to a facility or to make it immediately available for education.

NOTE: However, that these costs related to emergency repairs are eligible under § 219.41(b)(13) (*Eligible costs for assistance related to replacement of instructional and maintenance supplies, equipment, and materials; minor repairs; or provision of temporary facilities (Section 7(b) of Pub. L. 81-874)*).

(5) Latent damages not reported to the Secretary within six months of the date the Secretary receives the LEA's application.

(Authority: 20 U.S.C. 645(9)(10), 646(a))

(d)(1) *Effect of insurance coverage.* Eligible costs include only the amount of the LEA's expenses that exceeds any insurance proceeds on the damaged or destroyed facilities.

(2) A grantee shall prosecute insurance claims promptly and fully.

(Authority: 20 U.S.C. 646(a))

Subpart F—Hearings

§ 219.51 Hearings relating to assistance for restoration or replacement of school facilities (Section 16 of Pub. L. 81-815).

(a) *Right to an administrative hearing.* This section applies to an LEA that is an applicant or grantee for assistance for restoration or replacement of school facilities. This LEA has a right to an administrative hearing in either or both of the following circumstances:

(1) If the Secretary proposes in whole or in part to disapprove the LEA's application.

(2) If, after a grant has been made, the Secretary acts to withhold payments to the LEA (the circumstances in which this occurs are specified in Section 11(a) of Pub. L. 81-815).

(b) *Hearing procedures.* The procedures described in 34 CFR Part 218 govern these administrative hearings.

(Authority: 20 U.S.C. 636(c), 641(b))

§ 219.52 Hearings relating to assistance other than restoration or replacement of school facilities (Sections 7(a) and 7(b) of Pub. L. 81-874).

(a) *Right to an administrative hearing.* This section applies to an LEA that is an applicant or grantee for assistance for other than restoration or replacement of school facilities. This LEA has a right to an administrative hearing if an action of the Secretary affects the LEA adversely or aggrieves the LEA.

(b) *Hearing procedures.* The procedures described in Section 5(g) of Pub. L. 81-874 and in 34 CFR Part 218 govern these administrative hearings.

(Authority: 20 U.S.C. 240(g))

PART 221—ASSISTANCE FOR SCHOOL CONSTRUCTION IN AREAS AFFECTED BY FEDERAL ACTIVITIES

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AUTHORITY: 20 U.S.C. 631-647.

SOURCE: 52 FR 16750, May 5, 1987, unless otherwise noted.

Subpart A—General

§ 221.1 Assistance for School Construction in Areas Affected by Federal Activities.

(a) The program of Assistance for School Construction in Areas Affected by Federal Activities—referred to in these regulations as the School Construction Program—provides Federal financial assistance to help local educational agencies (LEAs) construct urgently needed minimum school facilities in school districts that have been affected by various Federal activities.

(b)(1) Under the School Construction Program the Secretary—as authorized in section 10 of the Act (Pub. L. 81-815)—may also make arrangements with another Department or agency to provide minimum school facilities for certain federally connected children in cases in which no LEA is able to provide a suitable free public education for these children.

(2)(i) The provisions governing these arrangements are contained in Subpart H of these regulations.

(ii) These arrangements do not provide assistance directly to an LEA.

(Authority 20 U.S.C. 631-645, 647)

§ 221.2 Who is eligible under the School Construction Program?

(a) *Assistance.* (1) The types of LEAs listed in paragraphs (b) through (i) of this section are eligible for assistance under the School Construction Program.

(2) Each paragraph refers to a specific section of Pub. L. 81-815, entitled School Construction in Areas Affected by Federal Activities, referred to in these regulations as "the Act."

(b) *Eligibility under section 5.* (1) An LEA is eligible under section 5 of the Act because of an increased number of federally connected children.

(2) The requirements for eligibility under section 5 are contained in §§ 221.10 through 221.15.

(c) *Eligibility under section 9.* (1) An LEA is eligible under section 9 of the Act because a temporary Federal activity has caused an increase in the number of federally connected children.

(2) The requirements for eligibility under section 9 are contained in §§ 221.20 and 221.21.

(d) *Eligibility under sections 14(a) and 14(b).* (1) An LEA is eligible under section 14(a) or 14(b) of the Act if it:

(i) Serves children residing on Indian lands; and

(ii) Has financial need.

(2) The requirements for eligibility under section 14(a) are contained in §§ 221.24 and 221.25.

(3) The requirements for eligibility under section 14(b) are contained in §§ 221.28 and 221.29.

(e) *Eligibility under section 14(c).* (1) An LEA is eligible under section 14(c) of the Act if:

(i) A substantial portion of the land area in the LEA's school district is Federal property; and

(ii) The LEA has financial need.

(2) The requirements for eligibility under section 14(c) are contained in §§ 221.32 and 221.33.

(f) *Eligibility under section 8(1) and 8(2).* (1) An LEA is eligible for supplementary assistance under section 8 of the Act if the LEA has already established its eligibility under section 5, 9, or 14 of the Act.

(2) The requirements for eligibility under section 8(1) are contained in § 221.36.

(3) The requirements for eligibility under section 8(2) are contained in § 221.38

(g) *Arrangements.* Another Department or agency is eligible to enter into an arrangement with the Secretary for the provision of minimum school facilities under section 10 of the Act if the requirements for an arrangement under § 221.90 are satisfied.

(Authority: 20 U.S.C. 635, 638-640, 644)

§ 221.3 What regulations apply to the School Construction Program?

The following regulations apply to the School Construction Program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR Part 74 (Administration of Grants) except for the following:

(i) Section 74.94 (Payment methods under construction grants).

(ii) Subpart 0 (Property).

(2) 34 CFR Part 75 (Direct Grant Programs) except for the following:

(i) Section 75.603 (Grantee's title to site).

(ii) Section 75.605 (Beginning the construction).

(3) 34 CFR Part 77 (Definitions that Apply to Department Regulations) except for the following terms:

(i) "Local educational agency" (LEA),

(ii) "State."

(iii) "State educational agency" (SEA).

(4) 34 CFR Part 78 (Education Appeal Board) if the Secretary refers to the Education Appeal Board a request for an administrative hearing under section 11(a) of the Act.

(5) 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(b) The regulations in 34 CFR Part 218 (Hearings in Connection with School Construction and Financial Assistance in Federally Impacted Areas).

(c) The regulations in this Part 221.

(Authority: 20 U.S.C. 3474)

§ 221.4 Under what circumstances may the Secretary waive or reduce requirements?

(a) The Secretary may waive or reduce certain requirements of this part—governing an LEA's eligibility to participate in the School Construction Program or limiting the amount of payment an LEA may receive under the program—if the Secretary determines that a waiver or reduction is necessary:

(1) To avoid inequity; and

(2) To avoid defeating the purposes of the Act.

(b) The general provisions that apply to the waiver or reduction of certain requirements are in § 221.43.

(c) The specific requirements that the Secretary may waive or reduce and the circumstances under which the Secretary may waive or reduce these requirements are identified in applicable provisions of this part.

(Authority: 20 U.S.C. 635, 639, 644)

§ 221.5 What definitions apply to the School Construction Program?

(a) *Definitions in the Act.* The following terms used in this part are defined in section 15 of the Act:

Base year
Child
Construct, Constructing, Construction
Federal property
Free public education
Increase period
Indian lands (included in the definition of "Federal property")
Local educational agency (LEA)
Low-rent housing (included in the definition of "Federal property")
Parent
School facilities
State
State educational agency (SEA)

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR Part 77 (Definitions that Apply to Department Regulations):

Applicant
Application
Award
Department
EDGAR
Equipment
Fiscal year
Grant
Grantee
Project
Secretary
Work of art

(c) *Definitions that apply to this part.* The following definitions also apply to this part: "Act" means Pub. L. 81-815, as amended, 20 U.S.C. 631-647.

Attendance area means the geographic area in which the children normally served by a school reside.

(Authority: 20 U.S.C. 635(e), 644 (a), (b), (c))

Average daily membership means:

(1) The definition given to that term by State law; or

(2) If State law does not define the term, the total days of membership of all pupils in an LEA's schools divided by the total number of days the schools were in session.

(Authority: 20 U.S.C. 645(5))

Facilities available to the LEA.

(1) This term means classrooms and related facilities, such as the following, which the Secretary considers in determining an LEA's need for assistance under this part:

(i) Existing school facilities constructed for educational purposes and currently suitable for instruction.

(ii) All school facilities for which a construction contract has been awarded before the contracts-let-date—that is, the date on which the Secretary files with the Office of the Federal Register a notice setting a closing date for receipt of preapplications.

(iii) Facilities constructed or to be constructed, contracted for, or supported with financial assistance under any other grant under the Act—that is, under the School Construction Program or under the Program of School Construction Assistance in Cases of Certain Disasters (section 16 of the Act—or under any other type of assistance.

(iv) Portable facilities used for instruction if:

(A) The facilities were purchased with funds under the Act; or

(B) The State counts the facilities as instructional facilities for the purpose of computing State construction aid.

(v) If the LEA is applying under section 8, 14(a), or 14(c) of the Act, potential facilities available to the LEA that could be built using, local, State, or other Federal sources, including other funds under the Act.

(2) This term does not mean:

(i) Areas unsuitable for education, such as hallways and basement rooms not constructed for educational purposes; and

(ii) Facilities that must be abandoned by the end of the second year following the increase period, for applicants under sections 5, 8(1), and 9, or by the end of the second year following the school year for which the applicant seeks assistance, for applicants under section 14.

(Authority: 20 U.S.C. 631, 634, 645(10))

Federally connected children means those children whose inclusion in an LEA's membership results from a permanent or temporary Federal activity. Each of these children can be identified in one or more of the categories listed in § 221.11.

(Authority: 20 U.S.C. 238(a), 644(a))

Isolated means, with reference to an attendance area, that distance, topography, climate, traffic conditions, or another factor makes it impracticable to transport children in that attendance area to other school facilities.

(Authority: 20 U.S.C. 635(e), 644 (a), (b), (c))

Membership.

(1) This term means:

(i) The definition given to the term by State law; or

(ii) If State law does not define the term, the number of children listed on an LEA's current enrollment records.

(2) As used in paragraph (1)(ii) of this definition, this term does not include children who have:

(i) Permanently left the school district; or

(ii) Otherwise became ineligible to attend classes there.

(3) If a child resides in the school district of an LEA that pays tuition to another LEA in whose district the child attends school, the child is counted in:

(i) The membership of the LEA of the child's district of residence; or

(ii) If both LEAs agree and the Secretary approves, the membership of the LEA in whose district the child attends school.

(Authority: 20 U.S.C. 645(5))

Minimum school facilities.

(1) This term means those school facilitites for which the Secretary may provide assistance under this part if:

(i) The Secretary, after consultation with the SEA and the LEA, considers these facilities necessary to support an educational program:

(A) For the membership to be served at normal capacity; and

(B) In accordance with the laws and common practice in the State; and

(ii) To the extent appropriate in view of the uses to be made of the facilities, they are accessible to and usable by handicapped persons.

(2) The term includes, but is not restricted to:

(i) Classrooms and related facilities; and

(ii) Machinery, utilities, and initial equipment, to the extent that these are necessary or appropriate for school purposes.

(3) The Secretary also considers the term to include:

(i) Works of art at a cost that does not exceed one percent of the cost of the project;

(ii) Within school buildings, spaces that:

(A) Provide shelter from nuclear fallout; and

(B) Are constructed at a nominal cost as part of a larger project; and

(iii) In the case of an application under section 9 or 10 of the Act, off-site improvements and interests in land.

(Authority: 20 U.S.C. 639, 640, 644, 645 (9), (10), E.O. 11490)

Non-Federal share means that portion of a project's cost supplied by a source or sources other than the Secretary under the Act.

(Authority: 20 U.S.C. 635)

Normal capacity means the number of pupils a school facility accommodates under ordinary conditions according to the laws and common practice of the State in which the facility is located.

(Authority: 20 U.S.C. 634, 645(9), (10))

Temporary, with reference to an activity, means an activity of the United States:

(1) Carried on either directly or through a contractor; and

(2) Continuing for at least one year but not more than six years.

(Authority: 20 U.S.C. 635, 639)

Unhoused children means those children in an LEA's membership whose number exceeds the normal capacity of facilities available to the LEA.

(Authority: 20 U.S.C. 634, 640, 644, 645(10))

Uniformed services.

(1) This term means the Army, Navy, Air Force, Marine Corps, Coast Guard, Natinal Oceanic and Atmospheric Administration, and Public Health Service.

(2) This definition applies to a uniformed service of the United States.

(Authority: 20 U.S.C. 238(a)(2), 635(a (1)(A), (2)(A); 37 U.S.C. 101)

Subpart B—What Are the Specific Eligibility Requirements for Assistance Under the School Construction Program?

ELIGIBILITY UNDER SECTION 5 OF THE ACT

§ 221.10 What are the requirements for eligibility under section 5 of the Act?

(a) An LEA is eligible to receive Federal financial assistance under section 5 of the Act if the Secretary determines that, during an increase period—that is, a period of four consecutive school years—the LEA has experienced or will have experienced a substantial increase in the number of federally connected children.

(b) In calculating the increase in federally connected children the LEA shall meet the requirements of §§ 221.11 through 221.13.

(Authority: 20 U.S.C. 635, 645(16))

§ 221.11 What children may be counted as federally connected?

(a) An LEA may count as federally connected those children whom the LEA can identify in one or more of the six categories describe in paragraphs (a)(1) through (6) of this section. The statutory reference for each category appears in parentheses after the title of the category.

(1) *Category 1* (section 5(a)(1)(A) of the Act). A child is in category 1 if the child—

(i)(A) Resides on Federal property; and

(B) Has a parent on active duty in the uniformed services; or

(ii) Resides on Indian lands.

(2) *Category 2* (section 5(a)(1)(B) of the Act). A child is in category 2 if the child—

(i) Resides on Federal property; and

(ii) Resides with a parent employed on Federal property situated in whole or in part in the same State as the school district of the LEA.

(3) *Category 3* (section 5(a)(2)(A) of the Act). A child is in category 3 if the child—

(i) Does not reside on Federal property; and

(ii) Has a parent on active duty in the uniformed services.

(4) *Category 4* (section 5(a)(2)(B) of the Act). A child is in category 4 if the child—

(i) Resides on Federal property; and

(ii) Is not in either category 1 or category 2.

(5) *Category 5* (section 5(a)(2)(C) of the Act). A child is in category 5 if the child—

(i) Does not reside on Federal property; and

(ii) Resides with a parent employed on Federal property that is situated in whole or in part in the same State as the school district of the LEA.

(6) *Category 6* (section 5(a)(3) of the Act). A child is in category 6 if the child's membership in the LEA results directly from activities of the United States carried on either directly or through a contractor.

(b) Although the LEA may identify a child for eligibility purposes within more than one category, the LEA may not count the child more than once for purposes of payment under this program during a given year.

(c) In counting federally connected children for its eligibility, an LEA may include—

(1) Children whose membership results from permanent Federal activities (eligibility under section 5 of the Act); and

(2) Children whose membership results from temporary Federal activities (eligibility under section 9 of the Act).

(NOTE.—Although an LEA in establishing its eligibility for assistance under section 5 of the Act may count children who qualify under section 9 of the Act, the Secretary does not include for payment under section 5 those children who qualify under section 9. See § 221.60(a)(c)(1).)

(Authority: 20 U.S.C. 238(a), (b), 635(a), 639).

§ 221.12 How does an LEA measure an increase?

(a) An LEA that claims an increase in federally connected children must show that the increase has occurred during an increase period.

(b) An increase in federally connected children is the difference between—

(1) The estimated number of federally connected children in the LEA's

membership at the close of the increase period; and

(2) The estimated number of federally connected children in the LEA's average daily membership during the base year; that is, during the school year immediately preceding the first year of the increase period.

Example. If the increase period covers the four consecutive school years of 1980-81, 1981-82, 1982-83, and 1983-84, the base year would be 1979-80.

(Authority: 20 U.S.C. 634, 635)

§ 221.13 What is the required minimum increase in the number or percentage of an LEA's federally connected children?

To be eligible for assistance under section 5 of the Act, an LEA must have, at the close of an increase period, an estimated increase in federally connected children, as follows:

(a) *Categories 1-5.* For children in categories 1 through 5, the estimated increase must be—

(1) At least 20 federally connected children, representing at least 6 percent of the LEA's total average daily membership during the base year; or

(2) At least 1,500 federally connected children, if the estimated increase represents less than the 6 percent required in paragraph (a)(1) of this section.

(b) *Category 6.* For children in category 6, the estimated increase must be—

(1) At least 20 federally connected children, representing at least 10 percent of the LEA's total average daily membership during the base year; or

(2) At least 2,500 federally connected children, if the estimated increase represents less than the 10 percent required in paragraph (b)(1) of this section.

(Authority: 20 U.S.C. 635(a), (b), (c))

§ 221.14 How does an LEA demonstrate financial need if it claims children in Category 6?

If an LEA bases its eligibility on an increased number of children in category 6, the LEA, in addition to meeting the requirements in § 221.13(b), shall demonstrate to the satisfaction of the Secretary that, without Federal assistance, construction of minimum school facilities for these children would cause an undue financial burden on the LEA's taxing and borrowing authority.

(Authority: 20 U.S.C. 635(c)(2))

§ 221.15 Under what circumstances may an LEA request a waiver or reduction of the minimum increase in the number or percentage of federally connected children?

(a) In applying for assistance under this part, an LEA may request a waiver or reduction of one or more of the following requirements:

(1) The minimum number requirement of 20 in § 221.13(a)(1).

(2) The minimum percentage requirement of 6 in § 221.13(a)(1).

(3) The minimum number requirement of 20 in § 221.13(b)(1).

(4) The minimum percentage requirement of 10 in § 221.13(b)(1).

(b) The Secretary considers the request for a waiver or reduction if the LEA meets the following conditions:

(1) The LEA has an isolated attendance area that is affected by Federal activity.

(2) At the end of the increase period, the LEA will have in its membership federally connected children residing in the isolated attendance area who lack minimum school facilities.

(3)(i) In the case of a request for a waiver or reduction of the minimum percentage requirement of 6 percent in § 221.13(a)(1), or of 10 percent in § 221.13(b)(1), the estimated increase in federally connected membership in the isolated attendance area at the end of the increase period is at least 10 percent of the total average daily membership in the isolated attendance area during the base year.

(ii) In the case of a request for a waiver or reduction of the minimum number requirement of 20 children in § § 221.13(a)(1) or 221.13(b)(1), the estimated increase in the number of the LEA's federally connected children at the end of the increase period is at least 25 percent of the LEA's total average daily membership in the base year.

(c) The general provisions that apply to this waiver or reduction are in § 221.43.

(Authority: 20 U.S.C. 635 (c), (e))

[52 FR 16750, May 5, 1987, as amended at 52 FR 28814, Aug. 3, 1987]

ELIGIBILITY UNDER SECTION 9 OF THE ACT

§ 221.20 What are the requirements for eligibility under section 9 of the Act?

An LEA is eligible to receive Federal financial assistance under section 9 of the Act if:

(a) During an increase period the LEA has experienced a substantial increase in the number of federally connected children; and

(b) The Secretary determines that some or all of these children are in the LEA's membership because of a temporary Federal activity.

(Authority: 20 U.S.C. 639)

§ 221.21 What other requirements apply to eligibility under section 9?

The provisions of §§ 221.11 through 221.15 also govern the eligibility of an LEA for Federal financial assistance under section 9 of the Act.

(Authority: 20 U.S.C. 635, 639)

ELIGIBILITY UNDER SECTION 14(A) OF THE ACT

§ 221.24 What are the requirements for eligibility under section 14(a) of the Act?

An LEA is eligible to receive Federal financial assistance under section 14(a) of the Act if it meets the following requirements:

(a) The LEA is providing, or will be providing on completion of the project, free public education to children in its membership who reside on Indian lands.

(b) The LEA is not eligible, under either section 5 or section 9 of the Act, for enough Federal financial assistance to provide minimum school facilities.

(c) Any one of the following three conditions exists:

(1) At least 15 of the LEA's children, constituting at least 33⅓ percent of the LEA's total membership, reside on Indian lands.

(2) The land area of Indian lands constitutes at least one-third of the total land area of the LEA's school district.

(3) The LEA is providing, or will be providing on completion of the project, free public education for at least 100 children residing on indian lands outside the boundaries of the LEA's school district.

(d) The immunity of Indian lands to taxation creates a substantial and continuing impairment of the LEA's ability to finance needed school facilities.

(e) The LEA is making a reasonable tax effort and is diligently making use of State and other available financial assistance to provide the needed facilities.

(f) Despite full use of the facilities available to it, the LEA lacks the resources to provide minimum school facilities for at least 5 percent of the estimated number of children who will be in the LEA's membership at the end of the second year following the school year for which the applicant seeks assistance.

(Authority: 20 U.S.C. 644(a))

§ 221.25 What requirements for eligibility under section 14(a) are subject to waiver or exemption?

(a) *Waiver.* The Secretary considers a request for a waiver of the 33⅓ percent requirement in § 221.24(c)(1) if an LEA meets the following three requirements:

(1) The LEA has an isolated attendance area that includes children who reside on Indian lands.

(2) The LEA is providing, or will be providing on completion of the project, free public education in this isolated attendance area to at least 15 children residing on Indian lands and constituting at least 20 percent of the LEA's total membership.

(3) The land area of Federal property constitutes at least 80 percent of the total land area of the LEA's school district.

(b) *General provisions.* The general provisions that apply to this waiver are in § 221.43.

(c) *Exemption.* The LEA does not have to meet the condition described in § 221.24(d) if the LEA is providing free public education for at least 100 children residing on Indian lands outside the boundaries of the LEA's school district.

(Authority: 20 U.S.C. 644(a))

ELIGIBILITY UNDER SECTION 14(b) OF THE ACT

§ 221.28 What are the requirements for eligibility under section 14(b) of the Act?

An LEA is eligible to receive Federal financial assistance under section 14(b) of the Act if it meets the following requirements:

(a) The requirements of § 221.24(a), (b), and (d).

(b) Any one of the following three conditions exists:

(1) At least 15 of the LEA's children, constituting at least 10 percent of the LEA's total membership, reside on Indian lands.

(2) The land area of Indian lands constitutes at least 10 percent of the total land area of the LEA's school district.

(3) The LEA is providing, or will be providing on completion of the project, free public education for at least 100 children residing on Indian lands outside the boundaries of the LEA's school district.

(Authority: 20 U.S.C. 644(b))

§ 221.29 What requirements for eligibility under section 14(b) are subject to waiver or exemption?

(a) *Waiver.* The Secretary considers a request for a waiver of the 10 percent requirement in § 221.28(b)(1) if an LEA meets the following three requirements:

(1) The LEA has an isolated attendance area that includes children who reside on Indian lands.

(2) The LEA is providing, or will be providing on completion of the project, free public education in this isolated attendance area to at least 15 children residing on Indian lands and constituting at least 5 percent of the LEA's total membership.

(3) The land area of Federal property constitutes at least 20 percent of the total land area of the LEA's school district.

(b) *General provisions.* The general provisions that apply to this waiver are in § 221.43.

(c) *Exemption.* The LEA does not have to meet the condition described in § 221.24(d) if the LEA is providing free public education for at least 100 children residing on Indian lands outside the boundaries of the LEA's school district.

(Authority: 20 U.S.C. 644(b))

ELIGIBILITY UNDER SECTION 14(c) OF THE ACT

§ 221.32 What are the requirements for eligibility under section 14(c) of the Act?

An LEA is eligible to receive Federal financial assistance under section 14(c) of the Act if it meets the following requirements:

(a) The requirements of § 221.24(b), (e), and (f).

(b) The land area of Federal property constitutes at least 33⅓ percent of the total land area of the LEA's school district.

(c) At least 20 of the LEA's children, constituting at least 33⅓ percent of the LEA's total membership, lack or will lack minimum school facilities.

(d) The immunity of Federal property to taxation creates a substantial and continuing impairment of the LEA's ability to finance needed school facilities.

(Authority: 20 U.S.C. 644(c))

§ 221.33 What requirement for eligibility under section 14(c) is subject to waiver?

(a) The Secretary considers a request for a waiver of the 33⅓ percent requirement in § 221.32(c) if an LEA meets the following three requirements:

(1) The LEA has an isolated attendance area with children who lack minimum school facilities.

(2) The LEA is providing, or will provide free public education in this isolated attendance area to at least 20 children lacking minimum school facilities and constituting at least 20 percent of the LEA's total membership.

(3) The land area of Federal property constitutes at least 80 percent of

the total land area of the LEA's school district.

(b) The general provisions that apply to this wavier are in § 221.43.

(Authority: 20 U.S.C. 644(c))

ELIGIBILITY UNDER SECTION 8(1) OF THE ACT

§ 221.36 What are the requirements for eligibility under section 8(1) of the Act?

(a) If the Secretary makes available supplemental Federal financial assistance under section 8(1) of the Act, an LEA is eligible to receive this assistance if the LEA:

(1) Is eligible to receive a grant under section 5 of the Act; and

(2) Has not received the grant because of its inability to finance the non-Federal share of the proposed project.

(b) In determining the LEA's eligibility under section 8(1), the Secretary requires that the LEA meet at least the following conditions:

(1) The LEA's eligibility under section 5 has not been achieved by reason of a waiver or reduction under § 221.15.

(2) The LEA demonstrates to the satisfaction of the Secretary that it is fully using or will fully use all other facilities available to the LEA.

(3)(i) The estimated number of the LEA's federally connected children who may be counted for payment is at least 12 percent of the LEA's average daily membership in the base year.

(ii) However:

(A) If the LEA has used one year of the increase period as a basis for payment under a previous application under the Act, the percentage requirement under paragraph (b)(3)(i) of this section is at least 9 percent;

(B) If the LEA has used two years of the increase period as a basis for payment under a previous application under the Act, the percentage requirement under paragraph (b)(3)(i) of this section is at least 6 percent; and

(C) If the LEA has used three years of the increase period as a basis for payment under a previous application under the Act, the percentage requirement under paragraph (b)(3)(i) of this section is at least 3 percent.

Example. An LEA submits a preapplication for Federal financial assistance under section 8(1) of the Act to supplement a grant under section 5 of the Act, based on an increase period consisting of the folloing school years: 1980–81, 1981–82, 1982–83, 1983–84. During the base year (1979–80), the LEA's average daily membership was 3,750. Under paragraph (b)(3)(i) of this section, the estimated number of the LEA's federally connected children who may be counted for payment would have to be at least 450 children; that is, at least 12 percent of the LEA's average daily membership in the base year.

However, in this example, the same LEA has previously submitted another eligible preapplication under section 5 of the Act for an increase period consisting of the following school years: 1978–79, 1979–80, 1980–81 and 1981–82. This means that the LEA is using in its current preapplication two of the same school years (1980–81 and 1981–82) used as a basis for payment under its previous preapplication. Thus, under paragraph (b)(3)(ii)(B) of this section, the estimated number of the LEA's federally connected children who may be counted for payment under the current preapplication must be at least 225; that is, at least 6 percent of the LEA's average daily membership in the base year.

(Authority: 20 U.S.C. 635, 638)

ELIGIBILITY UNDER SECTION 8(2) OF THE ACT

§ 221.38 What are the requirements for eligibility under section 8(2) of the Act?

If the Secretary makes available supplemental Federal financial assistance under section 8(2) of the Act, an LEA is eligible to receive this assistance if:

(a) The LEA has received a grant under section 5, 8, 9, or 14 of the Act;

(b) The LEA is unable to complete the project because of flood, fire, or similar emergency affecting:

(1) The work on the project; or

(2) The LEA's ability to finance the non-Federal share of the project; and

(c) The LEA demonstrates to the satisfaction of the Secretary that it is fully using or will fully use all other facilities available to the LEA.

(Authority: 20 U.S.C. 635, 638)

Subpart C—How Does a LEA Apply for Assistance Under the School Construction Program?

§ 221.40 What are the general requirements for submitting a preapplication and an application under the School Construction Program?

(a) To be considered for assistance under the School Construction Program, except in the case of an application under section 8(2) of the Act, an LEA must file with the Secretary:

(1) A preapplication; and

(2) If invited by the Secretary—on the basis of the likelihood of funding—an application that meets the requirements of section 6(b)(1) of the Act

(b)(1) The Secretary publishes in the FEDERAL REGISTER a notice that establishes a closing date for the filing of preapplications.

(2) If the Secretary invites an LEA to file an application under this part, the Secretary establishes in the letter of invitation a closing date for the filing of the application.

(c)(1) The LEA shall submit its preapplication and its application to the Secretary through its State educational agency (SEA).

(2) The LEA shall submit its preapplication or application to its SEA at least 15 days before the deadline date for filing the preapplication or application with the Secretary.

(3) The LEA is responsible for ensuring that the SEA carries out its responsibilities under this subpart, and forwards the preapplication or application to the Secretary on or before the applicable filing date.

(d) The requirements for filing an application under section 8(2) of the Act are in § 221.48.

(Authority: 20 U.S.C. 636)

§ 221.41 During what year must an LEA file its preapplication?

(a) In order to be considered for assistance under section 5, 9, or 8(1) of the Act, an LEA must file its preapplication during the third or fourth year of an increase period; that is, during the third or fourth year following the base year selected by the LEA.

Example. An LEA files a preapplication for Federal financial assistance under section 5, 9, or 8(1) of the Act for an increase period consisting of the following school years: 1980-81, 1981-82, 1982-83, 1983-84. The base year for this application is 1979-80. To be considered for assistance, the LEA must file its preapplication during the 1982-83 school year (the third year of the increase period) or during the 1983-84 school year (the fourth year of the increase period).

(b) During the same school year an LEA may file preapplications—under section 5, 9, or 8(1) of the Act—related to two different base years.

Example. During 1982-83, the third year of the increase period, an LEA may file a preapplication for Federal financial assistance under section 5, 9, or 8(1) of the Act for an increase period consisting of the following school years: 1980-81, 1981-82, 1982-83, 1983-84, with 1979-80 as the base year.

During the same year, 1982-83, the fourth year of another increase period, the LEA may file a preapplication for Federal financial assistance under section 5, 9, or 8(1) of the Act for an increase period consisting of the following school years: 1979-80, 1980-81, 1981-82, 1982-83, with 1978-79 as the base year.

Thus, in 1982-83, the LEA may file a preapplication related to base year 1979-80 and a preapplication related to base year 1978-79.

(c) In order to be considered for assistance under section 14(a), (b) or (c) of the Act, an LEA must file its preapplication during the first or second school year before the school year for which it seeks assistance.

Example. An LEA estimates that it will qualify for assistance under section 14(a), 14(b), or 14(c) of the Act during the 1985-86 school year. The LEA must apply for assistance during the 1983-84 school year or the 1984-85 school year.

(d)(1) The Secretary may hold for consideration for funding in a later year a preapplication that—

(i) Meets all requirements regarding eligibility and time of filing; and

(ii) Is from an LEA whose related application the Secretary would be unable to fund during the year for which the LEA has filed the preapplication.

(2) If funding becomes available for the project referred to in paragraph (d)(1) of this section, the Secretary,

before inviting an application from the LEA, verifies—

(i) The continued impact of federally connected children on the LEA; and

(ii) The LEA's continued need for assistance under this part.

(Authority: (20) U.S.C. 635, 638, 639, 644, 648(15))

§ 221.42 What information does an LEA need to support a preapplication and an application under the School Construction Program?

(a) During the year in which it files its preapplication, an LEA shall—

(1) Determine the number of children in its membership; and

(2) Identify the number of children in the membership who are federally connected.

(b)(1) The determination or identification made by the LEA under paragraph (a) of this section must be as of the same date throughout the LEA's school district.

(2) This date must be during the regular school year at a time before the closing date for the filing of applications.

(c) In identifying federally connected children the LEA may collect whatever information the LEA needs to—

(1) Establish the LEA's eligibility under the School Construction Program; and

(2) If necessary, substantiate factors that might affect the amount of payment to the LEA under the program.

(d) For each federally connected child identified by the LEA, the information referred to in paragraph (c) of this section must include the following:

(1) Name.

(2) Date of birth.

(3) School in which enrolled.

(4) Grade in school.

(5)(i) The name and address of the Federal property on which the child resides, including Indian land if applicable; and

(ii) In the case of low-rent housing project assisted under the United States Housing Act of 1937, the identification number, if any, assigned to that housing by the U.S. Department of Housing and Urban Development.

(6) If the child is federally connected because the child has a parent on active duty in a uniformed service:

(i) The parent's name;

(ii) The parent's rank;

(iii) The name of the uniformed service; and

(iv) An attestation of the parent's active duty status.

(7) If the child is federally connected because the child resides with a parent employed on Federal property situated in whole or in part in the same State as the school district of the LEA:

(i) The parent's name; and

(ii)(A) The name and address of the Federal property where the parent is employed; or

(B) If the parent is a civilian employed on a Federal vessel, the name, hull number, and home port of the vessel and the name of the controlling agency.

(e) The LEA may obtain the information in paragraph (d)(5) of this section from any of the following:

(1) A parent of the child.

(2) An appropriate official of the Federal installation on which the child resides or of the Federal housing in which the child resides.

(3) If applicable, an appropriate tribal official.

(f) The LEA may obtain the information in paragraph (d)(6) of this section from either or both of the following:

(1) A parent of the child.

(2) An appropriate official of the uniformed service in which the parent is on active duty.

(g) The LEA may obtain the information in paragraph (d)(7) of this section from either or both of the following:

(1) A parent of the child.

(2) The employer of the parent employed on Federal property.

(h) The LEA shall obtain from the source or sources of information referred to in paragraphs (e), (f), and (g) of this section:

(1) The sources's signature; and

(2) The date of signing.

(i) In identifying federally connected children the LEA may meet the requirements of paragraphs (d) through (h) of this section by means of the membership count used by the LEA that same school year to identify federally connected children under 34 CFR Part 222 (Assistance for Local Educational Agencies in Areas Affected by Federal Activities and Arrangements for Education of Children Where Local Educational Agencies Cannot Provide Suitable Free Public Education).

(j) The Secretary may require the LEA to update any of the information referred to in this section at the time the LEA files its application.

(k) For purposes of this section, "parent" means:

(1) Mother;

(2) Father;

(3) Legal guardian; or

(4) Another person standing in place of the parent.

(Approved by the Office of Management and Budget under control number 1810-0502)

(Authority: 20 U.S.C. 238, 635)

§ 221.43 What general provisions apply to a request for a waiver or reduction of certain requirements?

(a) If an LEA seeks a waiver or reduction of a requirement of these regulations for which the Secretary may grant a waiver or reduction, the LEA shall file its request as a separate document together with its preapplication.

(b) The LEA shall:

(1) State in the request the specific requirement(s) for which the LEA seeks the waiver or reduction; and

(2) Include in the request information the Secretary requires to determine whether the waiver or reduction is warranted.

(c) The Secretary determines:

(1) The extent of any waiver or reduction; and

(2) The portion of the LEA's jurisdiction for which the LEA receives assistance as a result of the waiver or reduction.

(Approved by the Office of Management and Budget under control number 1810-0502)

(Authority: 20 U.S.C. 635(e), 639, 644 (a), (b), (c))

§ 221.44 What are an SEA's responsibilities regarding a preapplication or an application from an LEA?

(a) *Preapplication.* In forwarding a preapplication from an LEA to the Secretary, an SEA shall—

(1) Certify that, to the best of the SEA's knowledge, the information in the preapplication is correct and complete; or

(2) Request a consultation with the Secretary regarding the information in the preapplication.

(b) *Application.* In forwarding an application from an LEA to the Secretary, an SEA shall—

(1) Certify that the proposed project is not inconsistent with overall State plans for the construction of school facilities; or

(2) Request a consultation with the Secretary regarding the relationship of the proposed project to overall State plans for the construction of school facilities.

(Authority: 20 U.S.C. 636, 644(e), 645(6), (10))

§ 221.45 What procedures does an SEA follow in certifying a preapplication or an application?

(a) The deadline dates for the filing of SEA certifications or requests for consultation are the same dates the Secretary establishes under § 221.40(b) for the filing of preapplications and applications from LEAs.

(b) If the SEA certifies a preapplication or application, the appropriate SEA official shall—

(1) Sign a statement that certifies the document; and

(2) Forward the document and the statement by the deadline date for filing the document. The procedures in EDGAR, 34 CFR 75.102 (Deadline date for applications), apply to this forwarding.

(c)(1) If an SEA certifies a preapplication and an application on or before the appropriate filing dates, or requests a consultation before those dates, the Secretary may select that project for a grant.

(2) If an SEA neither certifies a preapplication or an application on or before the appropriate filing dates for SEA certification nor requests a con-

sultation with the Secretary with regard to the preapplication or application on or before those dates, the Secretary does not select that project for a grant.

(Authority: 20 U.S.C. 636 (a), (b), 644(e), 645 (6), 10))

§ 221.46 How may an SEA comment on a preapplication or an application?

(a) An SEA that receives a preapplication or an application under this part may review and comment on the preapplication or application in addition to making the certification under § 221.44.

(b) In commenting on the LEA's preapplication or application, the SEA shall follow the provisions in EDGAR for State Comment Procedures (34 CFR 75.155 through 75.159).

(c)(1) The Secretary encourages the SEA to forward its comments, if any, together with the preapplication or application when the SEA forwards that document to the Secretary.

(2) If the SEA forwards its comments to the Secretary separately from the preapplication or application, the SEA shall meet the requirements of 34 CFR 75.158 (Deadlines for State comments).

(Authority: 20 U.S.C. 636, 645)

§ 221.47 What types of comments does the Secretary consider?

In evaluating an LEA's preapplication or application under this part, the Secretary considers—in addition to the provisions of 34 CFR 75.159(a)—those comments of an SEA that relate to—

(a) Any criteria or other matters that could affect the Secretary's approval of the preapplication or application;

(b) Any State laws or practices related to the construction of school facilities in the State; and

(c) Whether the proposed project is consistent with overall State plans for the construction of school facilities.

(Authority: 20 U.S.C. 636)

§ 221.48 What are the requirements for submitting an application under section 8(2) of the Act?

(a) In the case of an application for assistance under section 8(2) of the Act:

(1) The Secretary considers the LEA's approved preapplication and application for the original project funded under section 5, 9, 14 or 8(a) as meeting the requirement for submission of a preapplication; and

(2) The LEA shall file with the Secretary an application only.

(b) The LEA may file its application at any time.

(c) The LEA shall file its application with the Secretary through its SEA.

(d)(1) In forwarding the application to the Secretary, the SEA shall follow the appropriate provisions of § 221.45.

(2) The SEA may also comment on the application according to the provisions of § 221.46.

(Authority: 20 U.S.C. 636, 638)

§ 221.49 What general requirements apply to changes in an LEA's legal organization or jurisdiction?

(a) An LEA shall notify the Secretary of any changes in its legal organization or jurisdiction that:

(1)(i) Occur during the application process; or

(ii) Have occurred since the LEA's filing of its most recent previous application, if any, under the Act; and

(2) Would affect the LEA's rights or benefits under the Act.

(b)(1) If an LEA succeeds to any part of the territory of one or more other LEAs that have filed applications under the Act, the successor LEA may assume any rights and benefits that those applications have established with respect to the transferred territory if the successor LEA:

(i) Demonstrates to the Secretary that its succession to the territory and any affected property meets all requirements of State law; and

(ii) Agrees to be bound by all assurances and obligations under this part undertaken by the LEA(s) that filed the application(s).

(2) The successor LEA may not receive under those applications rights and benefits that are greater than the

total rights and benefits established by the application(s).

(Authority: 20 U.S.C. 636)

Subpart D—How Does the Secretary Determine Priorities for Funding Among Eligible Applications?

§ 221.50 What priorities does the Secretary apply?

If the amount of money estimated to be necessary to fund all eligible applications and requests is more than the amount the Congress appropriates for the School Construction Program for a fiscal year, the Secretary applies the following priorities for funding applications:

(a) *First priority.* (1) The first priority is full funding of all eligible applications and requests under sections 9, 10, and 14 (a) and (b) of the Act.

(2) If the Secretary is unable to provide full funding of all eligible applications and requests under sections 9, 10, and 14 (a) and (b), the Secretary:

(i) Groups preapplications under each of these three sections of the Act:

(ii) Except as specified in paragraph (a)(3) of this section, allocates to each group of preapplications funds in the ratio of (1) the total amount requested by all applicants in that group to (2) the total amount requested by all applicants in all groups.

(3) If the Secretary is unable to provide full funding of all eligible projects under sections 14 (a) and (b), the Secretary provides total funds for those projects at least equal to funds provided for projects under section 10.

(4)(i) In the case of preapplications under sections 9 and 14 (a) and (b), the Secretary assigns priority within each group in accordance with § 221.51.

(ii) However, if an applicant submitting a preapplication under section 9 does not have in its membership at least 20 unhoused children, the Secretary assigns a priority index of zero (0) to the preapplication.

(5) In the case of requests under section 10, the Secretary computes priority in accordance with § 221.94.

(b) *Second priority.* (1) The second priority is:

(i) Full funding of all eligible applications under sections 5 and 14(c) of the Act; and

(ii) Full funding of all eligible applications under section 8 of the Act if, for that year, the Secretary makes available supplemental assistance under section 8.

(2) If the Secretary is unable to provide full funding of all eligible applications under sections 5 and 14(c) and full funding of all eligible applications under section 8—if the Secretary makes available supplemental assistance under section 8—the Secretary applies the procedures in paragraphs (b)(3) and (b)(4) of this section.

(3) In the case of preapplications under sections 5, 8(1), and 14(c), the Secretary:

(i) Considers all of the preapplications as one group;

(ii)(A) Assigns priority in accordance with § 221.51.

(B) However, if an LEA submitting a preapplication under section 5, 8(1), or 14(c) does not have in its membership at least 20 unhoused children, the Secretary assigns a priority index of zero (0) to the preapplication; and

(iii) After fully funding all indexed applications—including those assigned an index of zero—gives consideration to making payments based on any increases in the number of children residing on property that is part of a low-rent housing project assisted under the United States Housing Act of 1937.

(4) In the case of applications under section 8(2), the Secretary:

(i) Assigns to each application the same priority index as that assigned to the original preapplication for that project;

(ii) Ranks each application in descending order of priority starting from the highest index, together with the group of preapplications under sections 5, 8(1), and 14(c); and

(iii) Holds until the next quarter of a fiscal year in which funds become available, all eligible applications the Secretary is unable to fund.

(c) The Secretary does not award any funds to applications in the second priority unless the Secretary is able to provide full funding of all eligible applications in the first priority.

(d) The Secretary reserves the right to fund eligible applications under section 16 of the Act (School Construction Assistance in Cases of Certain Disasters) regardless of the priority assigned by the Secretary under this section to any other preapplication.

(Authority: 20 U.S.C. 632, 633, 636(b)(2)(C), 644(e), (h))

§ 221.51 How does the Secretary compute priority indices and rank preapplications?

(a)(1) If the Secretary is unable to provide full funding of all applications in each group of applications under section 5, 8(1), 9, or 14 of the Act, the Secretary:

(i) Computes or assigns a priority index for each preapplication according to the provisions of §§ 221.50 and 221.51;

(ii) Ranks each preapplication in descending order of priority starting from the highest index; and

(iii) Funds applications in accordance with § 221.64.

(2) If the Secretary is unable to provide full funding of all requests under section 10 of the Act, the Secretary computes or assigns a priority index for each request according to the applicable provisions of § 221.50 and the provisions of § 221.94.

(b)(1)(i) In computing or assigning a priority index, the Secretary uses or refers to data included in the preapplication.

(ii) Before actually funding a project the Secretary may refer to the most recently available data and other information to confirm an applicant's priority index and ranking.

(2) The membership figures the Secretary uses in computing the priority index are the estimated figures as of the end of the increase period or, in the case of a preapplication under section 14(a) or (b), as of the end of the school year for which the LEA seeks assistance.

(3)(i) The figures the Secretary uses are those for the LEA as a whole.

(ii) However, if the preapplication is for an isolated attendance area, the Secretary uses the figures for that area only.

(c) The steps the Secretary uses in computing the priority index are as follows:

(1) *Step 1.* (i) The Secretary divides:

(A) The number of children countable for payment; by

(B) The total membership.

(ii) As used in this section and in § 221.52, the term "children countable for payment" includes children residing on property that is part of a low-rent housing project assisted under the United States Housing Act of 1937, even though those children are not eligible for payment unless the Secretary is able to provide full funding of all eligible applications in the second priority (§ 221.50(b)).

(2) *Step 2.* (i) The Secretary divides:

(A) The number of all unhoused children; by

(B) The total membership.

(ii) However, the Secretary limits the result of Step 2 to a number that does not exceed the result of Step 1. (See Example 2)

(3) *Step 3.* The Secretary adds:

(i) The result of Step 1; to

(ii) The result of Step 2.

(4) *Step 4.* The Secretary multiplies the result of Step 3 by 100.

Example 1. An LEA has a total membership of 1,000 pupils. Of that number, 200 are children countable for payment. Within the LEA 125 children are unhoused. This includes those who are federally connected and those who are not federally connected. In following the steps described in paragraph (c) of this section, the Secretary computes the priority index as follows:

Step 1. 200 divided by 1,000 equals 0.2

Step 2. 125 divided by 1,000 equals 0.125.

Step 3. 0.2 plus 0.125 equals 0.325.

Step 4. 0.325 multiplied by 100 equals 32.5.

Thus, the preapplication has a index of 32.5 The Secretary compares that index with the indices of all other preapplications in the same group and ranks the preapplications in descending order beginning with the preapplication with the highest index.

Example 2. An LEA has a total membership of 2,000 pupils. Of that number 400 are children countable for payment. Within the LEA 500 children are unhoused. This includes those who are federally connected and those who are not federally connected. In following the steps described in paragraph (c) of this section, the Secretary computes the priority index as follows:

Step 1. 400 divided by 2,000 equals 0.2.

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Step 2. 500 divided by 2,000 equals 0.25. However, in order to ensure that a priority index is not distorted by large numbers of unhoused children who are not federally connected, the Secretary limits the results of Step 2 to a number that does not exceed the result of Step 1. Therefore, the result of Step 2 is limited to 0.2.

Step 3. 0.2 plus 0.2 equals 0.4.

Step 4. 0.4 multiplied by 100 equals 40.0.

Thus, this preapplication has an index of 40.0.

(Authority: 20 U.S.C. 633, 635, 638, 639, 644)

§ 221.52 What procedures does the Secretary follow if two or more preapplications in the same group have identical indices?

Except for requests eligible under section 10 of the Act, if two or more preapplications in a group have indentical indices—including preapplications with an index of zero— the Secretary ranks these preapplications in descending order of sub-priority indices computed according to the following steps:

(a) *Step 1.* the Secretary divides—

(1) The number of children countable for payment; by

(2) The total membership.

(b) *Step 2.* the Secretary multiplies the result of Step 1 by 100.

Example. Two LEAs that have filed preapplications under section 9 of the Act have identical indices of 35.5, computed according to the steps in § 221.51(c). In order to determine which preapplication ranks higher, the Secretary applies the steps in this § 221.52.

One of the LEAs has a total membership of 1,000 pupils. Of that number 200 are children countable for payment. Following the steps described in ths section, the Secretary computes the sub-priority index for this preapplication as follows:

Step 1. 200 divided by 1,000 equals 0.2.

Step 2. 0.2 multiplied by 200 equals 20.0. Thus, this preapplication has a sub-priority index of 20.0.

The other LEA has a total membership of 1,300 pupils. Of that number, 233 are children countable for payment. Following the steps described in this section, the Secretary computes the sub-priority index for this preapplication as follows:

Step 1. 233 divided by 1,300 equals 0.179.

Step 2. 0.179 multiplied by 100 equals 17.9. Thus, this preapplication has sub-priority index of 17.9.

The Secretary then compares the two sub-priority indices of 20.0 and 17.9 and gives a higher rank to the preapplication from the LEA with a total membership of 1,000, including 200 children countable for payment; that is, the preapplication with the sub-priority index of 20.0.

(Authority: 20 U.S.C. 633)

§ 221.53 What effect may a delay in the starting date of construction have on an applicant's priority ranking?

(a) If the Secretary approves an application for funding during a particular funding cycle, the applicant shall begin construction of the project within 120 calendar days of notification of the Secretary's approval.

(b) If the applicant does not begin construction within 120 days, the secretary may—

(1) Extend the time if the applicant shows good cause to the Secretary; or

(2) Drop the application from that funding period and consider it in the next funding period—

(i) At the same priority index; or

(ii) At a priority index computed on the basis of new data.

(Authority: 20 U.S.C. 633, 636(b)(1)(D))

Subpart E—How Much Assistance is Available Under the Act?

§ 221.60 What assistance may the Secretary make available under section 5 of the Act?

(a) If an LEA is eligible for a grant under section 5 of the Act, as described in § 221.10, the Secretary may grant an amount in accordance with the provisions of section 5.

(b) The Secretary does not grant an amount that exceeds the cost of constructing, in the LEA's school district, minimum school facilites for the estimated membership in the district that—despite the full use of facilities available to the LEA—will lack minimum school facilities at the close of the second year following the increase period.

(c) In computing the amount of the grant, the Secretary does not include—

(1) Children whose membership in the LEA's school district the Secretary determines to be the result of a temporary Federal activity and who, therefore, are countable for payment under section 9 of the Act; and

(2) Children who receive or will receive services in facilities provided under section 10 of the Act.

(d) If the Secretary approves a request for a waiver or reduction under § 221.15 because an LEA has within it an isolated attendance area or areas, the Secretary limits the LEA's grant to an amount based on the lesser of—

(1) The increase in federally connected children eligible for payment in the LEA as a whole at the end of the increase period; and

(2) The increase in federally connected children eligible for payment in the isolated attendance area or areas at the end of the same increase period.

(Authority: 20 U.S.C. 634, 635, 639, 640)

§ 221.61 What assistance may the Secretary make available under section 9 of the Act?

(a) If an LEA is eligible for assistance under section 9 of the Act, as described in §§ 221.20 and 221.21, the Secretary may—

(1) Provide temporary facilities needed by the federally connected children who lack minimum school facilities and whose membership in the LEA's school district the Secretary determines is the result of a temporary Federal activity; or

(2) If the LEA assures the Secretary that it will provide at least minimum school facilities for these children, grant to the LEA an amount equal to the amount necessary to make temporary facilities available.

(b) In no case does the Secretary grant an amount that exceeds the cost of constructing, in the LEA's school district, minimum school facilities for these children.

(c) If the Secretary decides to transfer to the LEA facilities to carry out section 9 of the Act or facilities that have been used to carry out section 9, the Secretary establishes the terms and conditions of the transfer.

(Authority: 20 U.S.C. 635, 639)

§ 221.62 What assistance may the Secretary make available under section 14 of the Act?

(a)(1) If an LEA is eligible for a grant under section 14(a) or 14(c) of the Act, as described in §§ 221.24 and 221.32 respectively, the Secretary may grant an amount that does not exceed the cost of constructing minimum school facilities for the estimated number of children that—

(i) Will be in the LEA's membership two years after the end of the school year for which the applicant seeks assistance; and

(ii) Despite the full use of facilities available to the LEA, will lack minimum school facilities unless a grant is made.

(2) The Secretary counts for payment under paragraph (a)(1) of this section the estimated number of all unhoused children who will be in the LEA's membership, not only those children who reside on Federal property, including Indian lands.

(3) The Secretary does not grant an amount that exceeds the difference between—

(i) The cost of constructing minimum school facilities for the number of unhoused children; and

(ii) The amount the LEA has available or will have available for this purpose from other sources, including other Federal funds.

(b) If an LEA is eligible for a grant under section 14(b) of the Act, as described in § 221.28, the Secretary applies the provisions of paragraph (a) of this section, except that the only children the Secretary counts for payment are those who reside on Indian lands.

(c)(1) If an LEA is eligible for a grant under section 14 (a) or (b) of the Act as described in §§ 221.24 and 221.28 respectively, the Secretary may grant the LEA funds sufficient to—

(i) Construct consolidated school facilities in cases of consolidation of small school districts; or

(ii) Replace small, isolated, inadequate buildings.

(2) The Secretary may grant funds for a purpose stated in paragraph (c)(1) of this section even though the LEA may have enough classroom space to house all of the children.

(Authority: 20 U.S.C. 644)

§ 221.63 What assistance may the Secretary make available under section 8 of the Act?

(a)(1) If an LEA is eligible for a grant under section 8(1) of the Act because it is unable to finance the non-Federal share of a project under section 5 of the Act, as described in § 221.36, the Secretary may grant an amount that does not exceed the difference between—

(i) The cost of constructing, in the LEA's school district, minimum school facilities for the estimated membership in the district that—despite the full use of facilities available to the LEA—will lack minimum school facilities at the close of the second year following the increase period; and

(ii)(A) The amount the Secretary has approved as a grant for this purpose under section 5 of the Act; and

(B) The amount the LEA has available or will have available for this purpose from any other sources.

(2) In no case does the Secretary provide under paragraph (a) of this section an additional amount greater than the amount the Secretary has approved as a grant for this project under section 5 of the Act.

(3) In considering a request for assistance under paragraph (a) of this section, the Secretary uses the data included in the preapplication approved for this project under section 5 of the Act.

(b) If an LEA is eligible for a grant under section 8(2) of the Act because it has been prevented from completing a project by a flood, fire, or similar emergency, as described in § 221.38, the Secretary may grant an amount that does not exceed the difference between:

(1) The additional expenses caused by the emergency; and

(2) The amount the LEA has available or will have available for this purpose from other sources, including insurance payments.

(Authority: 20 U.S.C. 634, 638, 639, 644)

§ 221.64 In what order does the Secretary fund applications?

(a)(1) In the case of a group of applications under sections 5, 8(1), and 14(c) of the Act (see § 221.50(b)), if the Secretary is unable to provide full funding of all applications in the group, the Secretary funds applications in the group in descending order of priority index until the Secretary is unable to provide full funding of the next ranked application in the group.

(2) However, if the next ranked application for which the Secretary is unable to provide full funding is an application under section 14(c) of the Act, the Secretary may provide partial funding of the application.

(b) In the case of a group of applications under section 9 of the Act or a group of applications under section 14 (a) and (b) of this Act (see § 221.50(a)(2)), if the Secretary is unable to provide full funding of all applications in the group, the Secretary partially or fully funds applications in the group in descending order of priority index until the Secretary is unable to provide what the Secretary regards as adequate funding of the next ranked application in the group.

(c) In the case of a group of requests under section 10 of the Act, the Secretary applies the procedures under § 221.94.

(d) If the Secretary partially funds an application in a given year, the Secretary, to the extent possible the next time funds are available, completes the funding of that application before funding any new applications within the same group.

(Authority: 20 U.S.C. 632, 633, 636(b)(2)(c), 644 (e), (h))

§ 221.65 When may the Secretary make payments under the Act?

Except for projects under section 10 of the Act, after the Secretary has approved a grant award under the Act, the Secretary:

(a) Makes an intial payment of 10 percent of the approved estimated Federal share of the cost of the project; and

(b) May pay the remainder of the award in portions at various stages of the project.

(Authority: 20 U.S.C. 637(a))

Subpart F—What Conditions Must Be Met by a Grantee?

§ 221.70 What activities by a grantee require prior approval by the Secretary?

(a) A grantee may issue invitations for bids or enter into contracts for construction of its project only after the Secretary has:

(1)(i) Approved all plans and pertinent specifications; and

(ii) Determined that these plans and specifications are educationally adequate for the purpose for which they are intended; and

(2) Approved all documents related to the bids or contracts.

(b) A grantee may issue invitations for bids or requests for proposals relating to equipment for the project only after the Secretary has approved a list of the equipment to be procured and a budget for this equipment.

(Authority: 20 U.S.C. 636, 637, 642, 645(9))

§ 221.71 What provisions of the Indian Self-Determination and Education Assistance Act apply to the School Construction Program?

(a) Assistance under sections 14(a) and 14(b) of the Act is subject to the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93-638). That section requires that, to the greatest extent feasible, the recipient of any grant or contract awarded for the benefit of Indians:

(1) Give to Indians preferences and opportunities for training and employment in connection with the administration of the grant or contract; and

(2) Give to Indian organizations and to Indian-owned economic enterprises—as defined in section 3 of the Indian Financing Act of 1974 (Pub. L. 93-262)—preference in the award of contracts and subcontracts at any level of the administration of the construction project.

(Authority: 25 U.S.C. 450e(b), 1452(e))

(b) For purposes of this section, an "Indian" is a member of any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established under the Alaska Native Claims Settlement Act of 1971 (Pub. L. 92-203), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(Authority: 25 U.S.C. 450 (a), (b))

Subpart G—What Requirements Govern Administrative Hearings Under the School Construction Program?

§ 221.80 Under what circumstances may an LEA request an administrative hearing?

(a) An LEA may request an administrative hearing if:

(1) The Secretary notifies the LEA of the Secretary's intent to disapprove the LEA's preapplication or application in whole or in part; or

(2) After a grant has been made, the Secretary notifies the LEA of the Secretary's intent to withhold payments under the provisions of:

(i) Section 11(a) of the Act; or

(ii) Section 453 of the General Education Provisions Act (GEPA).

(b) In the case of an intent to withhold payments under section 11(a) of the Act, the Secretary may set a stated place and time for a hearing even if the LEA has not requested a hearing. (See 34 CFR 218.2(c).)

(Authority: 20 U.S.C. 636(c), 641(a), 1234b)

§ 221.81 How does an LEA request a hearing?

(a) Notwithstanding the possibility of a shorter time period stated in 34 CFR 218.2(c), within 60 days of receiving notification of the Secretary's intent to disapprove its preapplication or application or to withhold payments under section 11(a) of the Act, an LEA may submit to the Secretary a written request for a hearing.

(1) In its request the LEA shall clearly state the issues of fact and of law to be considered at the hearing.

(2) The LEA shall send a copy of its request to its SEA when the LEA submits its request to the Secretary.

(Authority: 20 U.S.C. 636(c) 641(b), 1234 (a), (e), 1234b(b))

(b) If the LEA is appealing a decision of the Secretary to withhold payments under section 453 of the GEPA, then the LEA must follow the procedures stated in 34 CFR 78.22 for filing an application for a hearing with the Department's Education Appeal Board.

§ 221.82 How does the Secretary treat a request for a hearing?

(a) After receiving an LEA's written request for a hearing, the Secretary follows the procedures in paragraph (b) or (c) of this section.

(b)(1) If the hearing concerns disapproval of the LEA's preapplication or application or a withholding of payments under section 11(a) of the Act, then the Secretary appoints a hearing officer and assigns the hearing to this hearing officer.

(2)(i) In this case, the provisions of 34 CFR Part 218 (Hearings in Connection with School Construction and Financial Assistance in Federally Impacted Areas) govern this hearing.

(ii) As used in 34 CFR Part 218, the term "application" includes a preapplication.

(3) If the hearing concerns a withholding of payments under section 453 of the CEPA, then the Education Appeal Board's procedures for a withholding hearing (34 CFR Part 78) govern this hearing.

(Authority: 20 U.S.C. 636(c), 641, 1234, 1234 (a), (e), 1234b(b))

Subpart H—What Special Provisions Govern Assistance Under Section 10 of the Act?

§ 221.90 Under what circumstances does the Secretary make arrangements for the provision of minimum school facilities under section 10 of the Act?

(a) The Secretary makes arrangements for constructing, leasing, renovating, remodeling, rehabilitating, or otherwise providing minimum school facilities for the types of children described in § 221.92 under any of the following circumstances:

(1) The State or any political subdivision of the State is prohibited by law from spending its tax revenues to provide for the free public education of these children.

(2) The Secretary determines, after consultation with the appropriate SEA, that no LEA is able to provide for the suitable free public education of these children as the term "suitable" is defined in § 221.91.

(3) The special circumstances described in § 221.92(b) (1) and (2).

(b) For purposes of this subpart, the terms "constructing, leasing, renovating, remodeling, rehabilitating, or otherwise providing" include repair, removal of architectural barriers, prevention of deterioration, upkeep, maintenance, upgrading for purposes of curriculum or to meet the standards of minimum school facilities, and, under circumstances described in § 221.93(a)(2), improvements to a site.

(c) To the maximum extent practicable, the facilities for which the Secretary makes arrangements under section 10 of the Act in any State are comparable to minimum school facilities provided for children in comparable communities in that State.

(Authority: 20 U.S.C. 640)

§ 221.91 What criteria does the Secretary use in determining whether a free public education is "suitable"?

The Secretary considers a free public education to be "suitable" if:

(a) The primary language of instruction is English;

(b) The distance between a pupil's home and the school facility the pupil attends or would attend is within the maximum commuting distance established by the State; and

(c)(1) The programs of instruction offered or that can be offered meet standards for State accreditation or approval.

(2) If the State does not have standards for accreditation or approval, the Secretary applies standards established by an appropriate accreditation association.

(Authority: 20 U.S.C. 640)

§ 221.92 For what types of children does the Secretary make arrangements for the provision of facilities under section 10?

(a) The Secretary makes arrangements for the provision of facilities under section 10 of the Act for the number of children—

(1) Who, the Secretary estimates in any fiscal year, will reside on Federal property at the end of the next fiscal year; and

(2) For whom minimum school facilities are unavailable because of the circumstances described in § 221.90(a) (1) or (2).

(b) The Secretary may make arrangements for the provision of facilities under section 10 of the Act for the following:

(1) Children who do not reside on Federal property, if—

(i) The children reside with a parent employed by the United States;

(ii) The minimum school facilities the Secretary provides are situated on Federal property in Puerto Rico, Wake Island, Guam, American Samoa, the Northern Mariana Islands, or the Virgin Islands; and

(iii) The Secretary, after consultation with the appropriate SEA, determines that—

(A) The construction or provision of the facilities is appropriate to carry out the purposes of the Act;

(B) No LEA is able to provide minimum school facilities for the suitable free public education of these children; and

(C) English is not the primary language of instruction in schools in the locality;

(2) Children of members of the Armed Forces—Army, Navy, Air Force, Marine Corps, Coast Guard—on active duty, if—

(i) The schools in which free public education is usually provided for these children are made unavailable to the children because of official action by State or local government authority; and

(ii) The Secretary, after consultation with the appropriate SEA, determines that no LEA is able to provide a suitable free public education for these children.

(c) *Ineligible children.* The Secretary does not make arrangements for the provision of facilities under section 10 for the following:

(1) Children who reside on Federal property formerly under the control of the Atomic Energy Commission and now under the control of the Department of Energy.

(2) Indian children attending federally operated Indian schools.

(Authority: 20 U.S.C. 640)

§ 221.93 For what types of projects may the Secretary provide assistance under section 10?

(a) The types of projects for which the Secretary may provide assistance under section 10 of the Act during any given year include, but are not restricted to, one or more of the following:

(1)(i) Emergency repairs to existing facilities for which the Secretary is responsible under section 10 of the Act.

(ii) As used in paragraph (a)(1)(i) of this section, the term "emergency repairs" means those repairs necessary—

(A) For the safety of persons using the facilities;

(B) For the removal of architectural barriers to the handicapped; or

(C) For the prevention of further deterioration of the facilities.

(2)(i) Non-emergency upkeep and maintenance of existing facilities for which the Secretary is responsible under section 10 of the Act.

(ii) As used in paragraph (a)(2)(i) of this section, upkeep and maintenance may include site improvements.

(3) Upgrading of existing facilities for which the Secretary is responsible under section 10 of the Act, if the purpose of the upgrading is to—

(i) Improve curriculum; or

(ii) Improve facilities to meet the standards of minimum school facilities.

(4) Provision of temporary facilities on Federal property pending—

(i) Emergency repairs; or

(ii) Construction of new minimum school facilities needed as a result of flood, fire, or other emergency.

(5) Construction of new minimum school facilities.

(b)(1) In the case of assistance for any type of project described in paragraphs (a)(1), (2), (3), and (4) of this section, the Secretary—

(i) Determines the extent to which assistance is needed and the urgency with which the assistance is needed; and

(ii) If necessary, notifies any other agency that might be affected by the determination.

(2) The Secretary makes these determinations, also, in the case of assistance for a project described in paragraph (a)(5) of this section if the need for the project results from a flood, fire, or other emergency.

(c) Except in cases of projects needed as a result of a flood, fire, or other emergency, if the Secretary in any given year decides to fund requests for assistance for the construction of new minimum school facilities, the Secretary announces the closing dates for the submissions of requests in a notice published in the FEDERAL REGISTER.

(Authority: 20 U.S.C. 640)

§ 221.94 How does the Secretary compute priority indices and rank non-emergency requests for new facilities under section 10?

(a) The provisions of this section apply if, in any given year, the Secretary—

(1) Decides to fund requests for assistance under section 10 of the Act for the construction of new minimum school facilities, except for facilities needed as a result of a flood, fire, or other emergency; and

(2) Is unable to provide full funding of all requests.

(b) The Secretary—

(1) Computes or assigns a priority index for each request for construction according to—

(i) The applicable provisions of § 221.50; and

(ii) The provisions of this § 221.94; and

(2) Ranks each request in descending order of priority starting from the highest index.

(c) The numbers of children the Secretary uses in computing the priority index are the estimated numbers as of the end of the next fiscal year.

(d) The steps the Secretary uses in computing the priority index are as follows:

(1) *Step 1.* The Secretary divides—

(i) The number of children to be housed in the school facilities described in the request; by

(ii) The total number of children who both reside on and attend school on the Federal property.

(2) *Step 2.* (i) The Secretary divides—

(A) The number of unhoused children; by

(B) The total number of children who both reside on and attend school on the Federal property.

(ii) The Secretary limits the result of Step 2 to a number that does not exceed the result of Step 1. The Secretary does this to ensure that a priority index is not distorted by large numbers of unhoused children who would not be accommodated by the facilities described in the request.

(3) *Step 3.* The Secretary adds—

(i) The result of Step 1; to

(ii) The result of Step 2.

(4) *Step 4.* The Secretary multiplies the result of Step 3 by 100.

(e) If two or more requests have identical indices, the Secretary ranks these requests in decending order of subpriority indices computed according to the following steps:

(1) *Step 1.* The Secretary divides—

(i) The number of children to be housed in the school facilities described in the request; by

(ii) The total number of children who both reside on and attend school on the Federal property.

(2) *Step 2.* The Secretary multiplies the result of Step 1 by 100.

(Authority: 20 U.S.C. 640)

§ 221.95 What terms and conditions apply to minimum school facilities operated under section 10 by another agency?

If the Secretary makes arrangements for the provision of minimum school facilities under section 10 of the Act, the Secretary—

(a) Arranges for the operation of the facilities by an agency other than the Department;

(b) Establishes terms and conditions for the operation of the facilities; and

(c) May require the operating agency to submit assurances and enter into other arrangements that the Secretary specifies.

(Authority: 20 U.S.C. 640)

§ 221.96 What terms and conditions apply to the transfer of minimum school facilities by the Secretary to an LEA?

If the Secretary decides to transfer to an LEA facilities that has been used to carry out the purposes of section 10 of the Act and for which the Secretary is responsible, the Secretary establishes the terms and conditions for the transfer.

(Authority: 20 U.S.C. 640)

PART 222—ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITIES AND ARRANGEMENTS FOR EDUCATION OF CHILDREN WHERE LOCAL EDUCATIONAL AGENCIES CANNOT PROVIDE SUITABLE FREE PUBLIC EDUCATION

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APPENDIX TO PART 222

AUTHORITY: 20 U.S.C. 236-241-1 and 242-244, unless otherwise noted.

SOURCE: 40 FR 16032, Apr. 8, 1975, unless otherwise noted. Redesignated at 45 FR

77368, Nov. 21, 1980, and amended at 53 FR 5553, Feb. 24, 1988.

Subpart A—Scope and Definitions

§ 222.1 Scope.

The regulations in this part govern the provision of financial assistance and the making of arrangements under the Act with regard to local educational agencies in areas affected by Federal activities.

(Authority: 20 U.S.C. 242(b))

§ 222.3 Definitions.

As used in this part:

Act means Titles I (except section 7) and IV of Pub. L. 874, 81st Congress (20 U.S.C. 236-241-1, 242-244), as amended.

Applicant means any local educational agency that files an application for financial assistance under section 2, 3, or 4 of the Act and the regulations in this part. For purposes of sections 3 and 4, a State educational agency may be an applicant only if the State agency directly operates and maintains facilities for providing free public education for the children it claims in its application.

(Authority: 20 U.S.C. 240(a) and 244(6))

Application means a properly completed and executed "Application for School Assistance in Federally Affected Areas" filed by an applicant requesting financial assistance under section 2, 3, or 4 of the Act and the regulations in this part, including amendments to the application and any supporting documents indicated by the applicant.

(Authority: 20 U.S.C. 240(a), 242(b))

Arrangements means an agreement entered into between the Secretary and a local educational agency or a Federal department or agency for the provision of free public education under section 6 of the Act.

(Authority: 20 U.S.C. 241(a))

County means, for the purpose of computing entitlement under section 3 of the Act and payments under section 5 of the Act as well as for the purpose of this part, those divisions of a State utilized by the Secretary of Commerce in compiling and reporting data regarding counties, subject to the following qualifications:

(1) Where a municipality or other political subdivision of a State is not treated as part of a county by the Secretary of Commerce in compiling and reporting data regarding counties, those municipalities and other political subdivisions are regarded as separate counties; and

(2) Where a local educational agency is situated in more than one county, the term "county" in the phrase "in the county in which the school district of such agency is located" includes any county in which the local educational agency is situated in whole or in part.

(Authority: 20 U.S.C. 238(a)(b) and note; 20 U.S.C. 244(11); 88 Stat. 534)

Current expenditures means expenditures for free public education, including expenditures for administration, instruction, attendance and health services, pupil transportation services, plant operation and maintenance, fixed charges, and expenditures to cover deficits for food services and student body activities. The term does not include expenditures for community services, capital outlay, debt service, or any expenditures made from funds granted for the purpose of Chapters 1 and 2 of Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2701—2976). An expenditure for the replacement of equipment is considered to be either a current expenditure or capital outlay, whichever is in accordance with State accounting guidelines, law, or practice.

(Authority: 20 U.S.C. 244(5))

Current fiscal year of the local educational agency means the fiscal year of the local educational agency for which the local educational agency seeks assistance.

(Authority: 20 U.S.C. 237, 238(d)(2)(B))

Entitlement means the amount of assistance which an applicant would receive under the formula prescribed under sections 2, 3, or 4 of the Act if the appropriations for a fiscal year were adequate to pay all claims.

(Authority: 20 U.S.C. 240(a), (b), (c))

Federally connected children refers to children described in subsection 3(a) or 3(b) of the Act.

(Authority: 20 U.S.C. 238)

Federal property.

(1) The term means the following:

(i) Real property that, because of Federal law, agreement, or policy, is exempt from taxation for elementary or secondary education current expenditure ("school") purposes by a State or political subdivision of a State or the District of Columbia, and:

(A) That the United States owns in fee simple or leases from another party;

(B) That is described in section 403(1)(A) of the Act (20 U.S.C. 244(1)(A)) (Indian lands), even if that real property is used for a low-rent housing project; or

(C) That is low-rent housing (whether or not owned by the United States) which is part of a low-rent housing project assisted under the United States Housing Act of 1937, as described in section 403(1)(C) of the Act (20 U.S.C. 244(1)(C)).

(ii) Real property that is exempt from taxation for school purposes by a State or political subdivision of a State or the District of Columbia, and:

(A) That is low-rent housing (whether or not owned by the United States) which is a part of a low-rent housing project assisted under section 516 of the Housing Act of 1949 (42 U.S.C. 1486) or Part B of Title III of the Economic Opportunity Act of 1964 (42 U.S.C. 2861-2864), as described in section 403(1)(C) of the Act (20 U.S.C. 244(1)(C));

(B) That is described in section 403(1)(D) of the Act (20 U.S.C. 244(1)(D)) (certain Air Force flight training schools); or

(C) That is described in section 403(1)(E) of the Act (20 U.S.C. 244(1)(E)) (tax-exempt real property owned by a foreign government or an international organization).

(iii) Notwithstanding the foregoing provisions of paragraph (1) of this definition, any Federal property described in paragraph (1) that is subject to a non-Federal interest such as an easement, lease, license, permit, or other arrangement, and improvements (except pipelines and utility lines) located on Federal property that is subject to such a non-Federal interest, even if the interest or improvements are subject to taxation for school purposes by a State or political subdivision of a State or the District of Columbia. For the purpose of this paragraph, the term "other arrangement" does not include a non-possessory interest in Federal property, such as a mortgage.

(iv) Ships that are owned by the United States and whose home ports are located upon Federal property described elsewhere in paragraph (1) of this definition.

(v) For one year beyond the end of the fiscal year in which the sale or transfer occurred (or for two years, in the case of real property transferred to the United States Postal Service), any Federal property described in the foregoing parts of paragraph (1) of this definition that is sold or transferred by the United States.

(2) Notwithstanding paragraph (1) of this definition, the term does not include real property under the jurisdiction of the United States Postal Service that is used primarily for the provision of postal service.

(3) For the purpose of determining eligibility and entitlements under section 2 of the Act, notwithstanding paragraph (1) of this definition, the term also does not include the following Federal property:

(i) Except for Indian lands described in section 403(1)(A) of the Act (20 U.S.C. 244(1)(A)), any real property that the United States does not own in fee simple, such as the following:

(A) Real property in which the United States holds an interest under an easement, lease, lease-purchase arrangement, license, permit, or trust;

(B) Low-rent housing property described in section 403(1)(C) of the Act (20 U.S.C. 244(1)(C)) that is not owned in fee simple by the United States;

(C) Real property described in section 403(1)(D) of the Act (20 U.S.C. 244(1)(D)) (certain Air Force flight training schools at State or municipally owned airports);

(D) Real property described in section 403(1)(E) of the Act (20 U.S.C. 244(1)(E)) (tax-exempt real property owned by a foreign government or an international organization); or

(E) After the end of the fiscal year in which the sale or transfer occurred, any Federal property described in the foregoing parts of this definition that is sold or transferred by the United States.

(ii) Any real property with respect to which payments are being made under section 13 of the Tennessee Valley Authority Act of 1933, as amended.

(Authority: 20 U.S.C. 237, 244(1))

Fiscally dependent local educational agency means local educational agency that does not have the final authority to determine the amount of revenue to be raised from local sources for school purposes.

(Authority: 20 U.S.C. 237(a), 238(d)(2)(B), 242(b))

Fiscally independent local educational agency means a local educational agency that has the final authority to determine the amount of revenue to be raised from local sources for school purposes within limits established by State law.

(Authority: 20 U.S.C. 237(a), 238(d)(2)(B), 242(b))

Local educational agency means a board of education or other legally constituted local school authority having administrative control and direction of free public elementary or secondary education through grade 12 in a county, township, independent, or other school district located within a State. This term includes a State educational agency so long as it also directly operates and maintains facilities for providing free public education for the children it claims in its application. Children claimed by a State educational agency must actually be attending State-operated facilities, and the State educational agency may not, through a tuition arrangement, contract, or any other means, pay another entity to operate and maintain facilities for those children.

(Authority: 20 U.S.C. 244(6))

Local real property tax rate for school (elementary and secondary education current expenditure) purposes. (1) The term means the following:

(i) For a fiscally independent LEA, a tax levied on real property within the LEA, if the total proceeds from the tax levy are available to that LEA for current expenditures.

(ii) For a fiscally dependent LEA—

(A) A tax levied by the general government on real property, if the total proceeds from the tax levy on all real property within the LEA are available to that LEA for current expenditures;

(B) That portion of a local real property tax rate designated by the general government for school purposes; or

(C) If no real property tax levied by the general government meets the criteria in paragraphs (1)(ii) (A) or (B) of this definition, an imputed tax rate that the Secretary determines by—

(*1*) Dividing the total local real property tax revenue available to the general government for current expenditures by the total revenue from all local sources available to the general government for current expenditures;

(*2*) Multiplying the figure obtained in paragraph (1)(ii)(C)(*1*) of this definition by the revenue received by the LEA for current expenditures from the general government; and

(*3*) Dividing the figure obtained in paragraph (1)(ii)(C)(*2*) of this definition by the total current actual assessed value of all real property in the district.

(2) In determining the local real property tax rate for school purposes, the Secretary does not include any portion of a tax or revenue that is restricted to or dedicated for any specific purpose other than elementary or secondary education current expenditures.

(Authority: 20 U.S.C. 237(a), 238(d)(2)(B))

Membership means—

(1)(i) The definition given to the term by State law; or

(ii) If State law does not define the term, the number of children listed on a local educational agency's current enrollment records on its survey date. The membership of children for whom the applicant is responsible for providing a free public education but who are attending schools other than those operated by the applicant, under a tuition arrangement described in

§ 222.81(d), must be included in the applicant's membership count.

(2) This term does not include children who—

(i) Have never attended classes in schools of the local educational agency or of another educational entity that the local educational agency has a tuition arrangement with;

(ii) Have permanently left the school district;

(iii) Otherwise have become ineligible to attend classes there; or

(iv) Attend the schools of the applicant under a tuition arrangement with another local educational agency that is responsible for providing them a free public education.

(Authority: 20 U.S.C. 238, 242(b), 244(10))

Parent employed on Federal property includes—

(1)(i) An employee of the Federal Government who reports to work on or whose place of work is located on Federal property;

(ii) A person not employed by the Federal Government but who spends more than 50 percent of his working time on Federal property (whether an employee or self-employed) when engaged in farming, grazing, lumbering, mining, or other operations that are authorized by the Federal Government, through a lease or other arrangement, to be carried out entirely or partly on Federal property; and

(iii) A portion, to be determined by the Secretary, of persons working on commingled Federal and non-Federal properties other than those persons covered under paragraph (1)(ii) of this definition.

(2) This term does not include a person who reports to work at a work station not on Federal property but spends more than 50 percent of his working time on Federal property providing services to operations or activities authorized to be carried out on Federal property.

(Authority: 20 U.S.C. 236, 238, 242(b))

Parent-pupil survey means a questionnaire provided by the applicant and which is to be filled out by a parent in order to substantiate residence or employment on Federal property. Such survey must include:

(1) Pupil-enrollment information (this information may also be obtained from school records) including:

(i) Name of pupil;

(ii) Date of birth; and

(iii) Name of public school, grade, and teacher.

(2) Pupil-residence and parent-employment information, including:

(i) Address on pupil residence (including the name of the Federal facility if such residence is on Federal property); and

(ii) Name (as it appears on employer's payroll record) of parent (mother, father, legal guardian or other person standing in loco parentis) who is employed on Federal property and with whom such pupil resides, unless the parent is a member of the uniformed services on active duty;

(iii) Name and address of Federal property on which the parent is employed unless the parent is a member of the uniformed services on active duty;

(iv) If the parent is a member of the uniformed services on active duty, the name, the rank, and branch of service of such parent;

(v) If the parent is a civilian employed on a Federal vessel, the name of vessel, hull number, and name of controlling agency must be obtained;

(vi) The signature of the parent supplying the information and the date of such signature must be obtained; and

(vii) The name and address of the employer (unless parent is a member of the uniformed services on active duty).

(3) Only in unusual circumstances may partially completed survey forms or survey forms which are signed by a person other than parent or person standing in loco parentis be accepted on membership survey forms. In such instances the survey form must show why the parent did not sign, and when, how, and from whom the residence and employment information was obtained.

(Authority: 20 U.S.C. 240(a)(1))

Prorated entitlement means the amount of financial assistance which an applicant will receive under the adjustment formula prescribed in the Act (including any other pertinent modifications or amendments), if the appropriations for a fiscal year are inadequate to pay all claims under sections 2, 3, 4, or 6 of the Act.

(Authority: 20 U.S.C. 240(c))

Real property is defined as follows:

(1) *Real property* means—

(i) Land; and

(ii) Improvements (such as buildings and appurtenances thereto, railroad lines, utility lines, pipelines, and other permanent fixtures), except as provided in paragraph (2) of this definition.

(2) *Real property* does not include—

(i) Improvements that are classified as personal property under State law; or

(ii) Equipment and movable machinery, such as motor vehicles, movable house trailers, farm machinery, rolling railroad stock, and floating dry docks, unless that equipment or movable machinery is classified as real property or subject to local real property taxation under State law.

(3) The definition of "real property" in 34 CFR 74.132 (Administration of [ED] grants) does not apply to this part.

(Authority: 20 U.S.C. 237, 244(1))

Revenues derived from local sources include the following:

(1) Tax funds derived from real estate;

(i) Such tax funds derived from real estate include:

(*a*) Locally received funds which are derived from local taxation of real property;

(*b*) Tax funds which are received on account of Wherry-Spence housing projects (12 U.S.C. 1702, et seq.) located on private property; and

(*c*) All local real property tax funds which are received from either the county or the State, serving as a collecting agency, and which are returned to the local educational agency for expenditure by that agency;

(ii) Such tax funds derived from real estate do not include:

(*a*) Any payments under this Act or the Johnson-O'Malley Act (25 U.S.C. 452);

(*b*) Tax payments which are received on account of Wherry-Spence housing projects located on federally owned property; or

(*c*) Local real property tax funds which are received by the State and distributed to local educational agencies on a per-pupil or formula basis; or

(2) Taxes or receipts which are received from the county, and any other local tax or miscellaneous receipts.

(Authority: 20 U.S.C. 238(d)(2); H. Rept. No. 22-87, 81st Cong., 2d Sess., (June 30, 1950), 12-15)

School year as used in this part, means the period between July 1 of one year and June 30 of the subsequent year.

State aid with respect to free public education means any contribution, no repayment of which is expected, made by a State to or on behalf of a local educational agency within the State for the support of free public elementary and secondary education. Such assistance does not include payments by a State to or on behalf of a local educational agency which are made as a result of a "major disaster" as such term is used in section 7 of Pub. L. 81-874.

(Authority: 20 U.S.C. 240(d)(1))

Uniformed services means the United States Army, Navy, Air Force, Marine Corps, Coast Guard, National Oceanic and Atmospheric Administration, and Public Health Service.

(Authority: 20 U.S.C. 238 and 37 U.S.C. 101)

Working on Federal property means employed on Federal property, as defined in the Act and the regulations in this part. Such term includes the following:

(1) A person who is employed (whether a regular employee or self-employed) either part time or full time in lumbering, farming, or grazing operations which are carried out entirely or partly on Federal property if, during such period, he spends a greater part of his working time on the Federal property than on the non-Federal property;

(2) A person who lives on Indian lands which are Federal property, as defined in the Act and these regulations, and who is not regularly employed on non-Federal property; and

(3) A portion, to be determined by the Secretary, of the persons working

on commingled Federal and non-Federal properties other than those covered by paragraph (m)(1) of this section.

(Authority: 20 U.S.C. 238(a) and (b), 244(1); H.R. No. 703, 83d Cong., 1st Sess., (July 3, 1953), 26, H.R. 1532, 85th Cong., 2d Sess., (March 19, 1958), 51 20 U.S.C. 242)

(Approved by the Office of Management and Budget under control number 1810-0036)

[40 FR 16032, Apr. 8, 1975, as amended at 43 FR 19129, May 3, 1978. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 51 FR 6110, Feb. 20, 1986; 53 FR 5554, Feb. 24, 1988; 53 FR 39019, Oct. 4, 1988; 54 FR 30040, July 18, 1989; 54 FR 37253, Sept. 7, 1989; 54 FR 47076, Nov. 9, 1989; 54 FR 51881, Dec. 19, 1989]

Subpart B—Applications

§ 222.9 Application form.

Any local educational agency (LEA) seeking financial assistance under section 2, 3, or 4 of the Act shall, as a condition of entitlement, file with the Secretary an "Application for School Assistance in Federally Affected Areas." A copy of the application must be filed with the State educational agency (SEA) in accordance with the applicable filing dates established in §§ 222.10 and 222.11 and must contain information necessary to establish the LEA's entitlement under the Act and regulations. Copies of the application form may be obtained from the SEA.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 240(a))

[54 FR 37254, Sept. 7, 1989, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.10 Application filing requirements.

Beginning with fiscal year (FY) 1990, to be considered for financial assistance under section 2, 3, or 4 of the Act, an LEA must meet the following requirements:

(a) Except as provided in paragraphs (c) and (e) of this section, an LEA must—

(1) File its application for financial assistance under section 2, 3, or 4 with the Secretary on or before January 31 of the fiscal year for which assistance is sought; and

(2) Certify that it will file, and file, a copy of the application referred to in paragraph (a)(1) of this section with its SEA on or before January 31 of the fiscal year for which assistance is sought.

(b)(1) Except as provided in paragraphs (c) and (e) of this section, an SEA must notify the Secretary of any inconsistencies or other concerns it has with an LEA's application on or before February 15 of the fiscal year for which assistance is sought. If the Secretary does not receive any notification from an LEA's SEA by February 15, the Secretary assumes that the data and statements in the application are, to the best of the SEA's knowledge, true, complete, and correct.

(2) An application that is timely filed under paragraph (a)(1) of this section is not processed for payment until any concerns raised by the SEA are resolved.

(c)(1) If any of the following events, giving rise to eligibility or entitlement, occurs within the fiscal year for which assistance is sought, an LEA seeking assistance shall file an application within the time limits required by paragraph (c)(2) of this section:

(i) The United States Government initiates or reactivates a Federal activity, or acquires real property.

(ii) The United States Congress enacts new legislation.

(iii) A reorganization of school districts takes place.

(iv) Property, previously determined in writing by the Secretary not to be Federal property, is determined to be Federal property.

(2) Except as provided in paragraph (e) of this section, an LEA shall file an application as permitted by paragraph (c)(1) of this section as follows:

(i) The LEA shall file the application on or before January 31 of the fiscal year for which assistance is sought or within 60 days after the applicable event occurs, whichever date is later, but not later than September 30, the end of the Federal fiscal year.

(ii) The LEA shall also certify that it will file, and file, a copy of the application referred to in paragraph (c)(2)(i) of this section with its SEA on or before September 30 of the fiscal year for which assistance is sought.

(d)(1) Except as provided in paragraph (e) of this section, an SEA must notify the Secretary of any inconsistencies or other concerns with an LEA's application within fifteen days of the applicable filing date. If the Secretary does not receive any notification from the SEA, the Secretary assumes that the data and statements in the application are, to the best of the SEA's knowledge, true, complete, and correct.

(2) An application that is timely filed under paragraph (c)(2)(i) of this section is not processed for payment until any concerns raised by the SEA are resolved.

(e) If a filing date set forth in this section falls on a Saturday, Sunday, or Federal holiday, the deadline for filing an application is the next succeeding business day.

(f) To be timely filed under this section, an application must be—

(1) Received by the Secretary on or before the applicable filing date; or

(2) Bear a U.S. Postal Service postmark dated on or before that filing date.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 240(a))

NOTE TO PARAGRAPH (f)(2): The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

[54 FR 37254, Sept. 7, 1989, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.11 Amendments to applications: Filing dates.

(a) An LEA may amend its application following any of the events described in § 222.10(c) by submitting a written request to the Secretary and a copy to its SEA within 60 days after the applicable event occurs, or by the end of the Federal fiscal year for which assistance is sought, whichever is earlier.

(b) The LEA may also amend its application no later than the end of the Federal fiscal year for which assistance is sought—

(1) For an adjustment to its entitlement based on data obtained from a second membership count; or

(2) For an adjustment to its entitlement based on actual satisfactory data regarding eligible Federal properties or federally connected children if that data were not available at the time the LEA filed its application.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 240(a))

[51 FR 6110, Feb. 20, 1986, as amended at 54 FR 37254, Sept. 7, 1989; 54 FR 47076, Nov. 9, 1989]

§ 222.12 Applications under sections 2, 3, and 4 received after deadlines.

The Secretary does not process for payment applications for assistance under sections 2, 3, and 4 of the Act that are not timely filed with the Secretary in accordance with the applicable filing dates established by §§ 222.10 and 222.11.

(Authority: 20 U.S.C. 240(a))

[54 FR 37254, Sept. 7, 1989]

§ 222.13 Notification to applicants.

Each applicant will be notified of the results of the review of its application under one or more of the sections or subsections of the Act, and the estimated amount of the payment, if any, to be made.

(Authority: 20 U.S.C. 240)

§ 222.14 Membership data: General.

(a) The Secretary determines the amount of an LEA's entitlement on the basis of information in the LEA's application including information regarding membership of federally connected children.

(b) In its application the LEA shall supply information regarding membership on the basis of any count described in §§ 222.15 through 222.17.

(Approved by Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 240(a))

[51 FR 6110, Feb. 20, 1986, as amended at 54 FR 37254, Sept. 7, 1989; 54 FR 47076, Nov. 9, 1989]

§ 222.15 First or only membership count.

(a)(1) An applicant shall select a given day in the current school year as the survey date for making the membership count.

(2) The survey date must be at least three days after the start of the school year and before January 31 of the fiscal year for which assistance is sought.

(3) The applicant shall use the same survey date for all schools in the school district.

(b)(1) As of the survey date, the applicant shall count the membership of all federally connected children within the categories described in sections 3 and 4 of the Act.

(2) The LEA shall also count as of that same date the membership of all its children—federally connected and non-federally connected.

(Approved by the Ofice of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238, 239, 240(a))

[51 FR 6110, Feb. 20, 1986, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.16 Second membership count.

(a) The applicant may, but is not required to, make a second count of membership during the last quarter of the current school year.

(b) For this count the applicant shall select a survey date in that quarter.

(c) The applicant shall use the same survey date for all schools in the school district.

(d) Information obtained from this count is used in amending the LEA's application as described in § 222.111 (b)(1).

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238, 239, 240(a))

[51 FR 6110, Feb. 20, 1986, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.17 Alternative methods for counting federally connected children.

An applicant may use one of the two following methods to count federally connected children and to obtain the information described in the definition of "parent-pupil survey" in § 222.3:

(a) The applicant may determine federally connected membership by conducting a parent-pupil survey.

(b) The applicant may determine federally connected membership by obtaining certificates from—

(1) Employers as to the employment of parents of children claimed; or

(2) Housing officials as to the residence of the children on the survey date; or

(3) Both (b) (1) and (2), if necessary.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238, 239, 240(a))

[51 FR 6111, Feb. 20, 1986, as amended at 53 FR 5555, Feb. 24, 1988; 54 FR 37254, Sept. 7, 1989; 54 FR 47076, Nov. 9, 1989]

§ 222.18 Assurances and parental participation with respect to Indian children for applications under section 3.

(a) Each application for payment under section 3(a) or section 3(b) of the Act which is based upon children who reside on or reside with a parent employed on Indian lands (as included within the definition of Federal property under section 403(1)(A) of the Act) shall set forth adequate assurance that Indian children will participate on an equitable basis in the school program of the applicant local educational agency.

(Authority: Pub. L. 92-318, section 411(a); (20 U.S.C. 240(a)(2))

(b) Each application based upon children as described in paragraph (a) of this section shall:

(1) Set forth such policies and procedures as will ensure that programs and projects assisted under the application have been planned and developed, and will be operated in consultation with, and with the involvement of parents of, the children to be served by such programs and projects. Applicants must submit a brief statement describing such policies and procedures with each application;

(2) Be submitted with assurance that such parents have had an opportunity to present their views with respect to the application; and

(3) Set forth policies and procedures for adequate dissemination of program

plans and evaluations to such parents and the public. Applicants must submit a brief statement describing such policies and procedures with each application.

(c) It shall be the responsibility of the applicant local educational agency to provide to the parents of such children:

(1) Opportunity to make recommendations to the local educational agency concerning the needs of the Indian children;

(2) Opportunity to consult with the local educational agency concerning the ways in which such parents can assist their children in realizing the benefits to be derived from the educational program of the local educational agency; and

(3) Opportunity to present their views to the appropriate school personnel concerning the educational program and parental participation.

(Authority: 20 U.S.C. 1231d; Pub. L. 92-318, section 411(a))

[40 FR 16032, Apr. 8, 1975. Redesignated at 45 FR 77368, Nov. 21, 1980. Redesignated at 51 FR 6110, Feb. 20, 1986]

§ 222.19 Civil rights.

(a) Federal financial assistance is subject to the regulations in Part 100 of this title, issued by the Secretary and approved by the President to effectuate the provisions of Title VI of the Civil Rights Act of 1964. (Pub. L. 88-352)

(Authority: 42 U.S.C. 2000d)

(b) Federal financial assistance is also subject to the provisions of Title IX of the Education Amendments of 1972 (prohibition of sex discrimination), and any regulations issued thereunder.

(Authority: Pub. L. 92-318, Title IX)

[40 FR 16032, Apr. 8, 1975. Redesignated at 45 FR 77368, Nov. 21, 1980. Redesignated at 51 FR 6110, Feb. 20, 1986]

Subpart C—Payments

§ 222.20 Changes affecting boundaries, classification, control, governing authority, or identity of applicants.

(a) Any applicant that is a party to an annexation, consolidation, deconsolidation, merger, or other similar action affecting its boundaries, classification, control, governing authority, or identity must provide to the Secretary as soon as practicable:

(1) A description of the character and extent of the change,

(2) The effective date of the change;

(3) Full identification of all predecessor and successor local educational agencies (LEAs);

(4) Full information regarding the disposition of the assets and liabilities of all predecessor LEAs;

(5) Identification of the governing body of all successor LEAs; and

(6) The name and address of each authorized representative officially designated by the governing body of each successor LEA for purposes of Pub. L. 81-874.

(b) If a payment is made under sections 2, 3, or 4 of the Act (hereinafter "sections 2, 3, or 4") to an LEA that, because of a change in boundaries or organization, has ceased to be a legally constituted entity during the regular school term, the LEA may retain that payment if:

(1) An adjustment is made in the entitlement of a successor LEA to account for the payment; or

(2)(i) The payment amount does not exceed the amount the former LEA would have been entitled to receive if the change in boundaries or organization had not taken place; and

(ii) A successor LEA is not an eligible applicant.

(c) Any portion of a payment made under sections 2, 3, or 4 to a former LEA that exceeds the amount allowed by paragraph (b)(2)(i) of this section must be returned to the Secretary.

(d)(1) Except as provided in § 222.21(d), a successor LEA that is eligible for section 3 or 4 assistance may elect to have the Secretary determine its section 3 or 4 entitlement for the entire fiscal year upon either of the following bases:

(i) The entire area within its jurisdiction on the last day of that fiscal year.

(ii) The area within the jurisdiction of one or more of the former LEAs that would have been entitled to receive payment under section 3 or 4 if the change in boundaries or organization had not occurred.

(2) A successor LEA's section 2 eligibility and entitlement are determined in accordance with § 222.102.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 237, 238, 239, 242(b))

[53 FR 5555, Feb. 24, 1988, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.21 Payments under section 3 when percentage eligibility requirement is not met.

(a) Under the exception provided in section 3(c)(2)(A)(ii) of the Act, an applicant continues to be eligible for payment under the Act, even if it fails to meet the 3 percent eligibility requirement of section 3(c)(1)(B) of the Act, for two years following any fiscal year in which it: (1) Was determined to be eligible under that requirement and (2) received a net payment under section 3.

(b) The number of children determined for the purpose of establishing the amount of entitlement under section 3 in the second fiscal year of the two-year period specified in paragraph (a) may not exceed 50 percent of the number of children in each federally-connected subcategory for the last fiscal year during which the applicant met the eligibility requirement of section 3(c)(1)(B) of the Act.

(c) If an applicant local educational agency was not in existence in either one or both of the two fiscal years preceding that for which application is made, that agency may nevertheless receive the benefit of the provisions of paragraph (a) of this section if that agency is:

(1) Composed only of territory which was formerly included in a predecessor agency or agencies which were determined to have met the percentage eligibility requirement contained in section 3(c)(1)(B) of the Act for the fiscal year two years or one year before the year for which application is made; and

(2) The predecessor agency or agencies received a net payment under section 3 of the Act for the fiscal year two years or immediately before that for which application is made.

(Authority: 20 U.S.C. 238(c)(2)(A)(ii))

(d) If any local educational agency which had filed an application in a timely manner under section 3 of the Act and was entitled to payment by virtue of paragraph (a) or (c) of this section ceases to be a legally constituted local educational agency as a result of a district reorganization which is effective before the close of the regular school term within the fiscal year covered by the application (thereby becoming subject to the provisions of § 222.20(b)), a successor local educational agency which:

(1) Files an application in accordance with § 222.10(b)(1)(iii) (unless already an applicant under section 3); and

(2) Assumes administrative control and direction of free public education in all or a portion of the area of the previously existing applicant before the close of the applicant's regular school term, may have its application processed on the basis of the:

(i) Area acquired from the previously existing local educational agency, and

(ii) Rights of that agency, without regard to the 3 percent requirement, subject to appropriate adjustment on account of payments made to the previously existing local educational agency.

(Authority: 20 U.S.C. 238, 244(6)(A))

[40 FR 16032, Apr. 8, 1975. Redesignated at 45 FR 77368, Nov. 21, 1980. Redesignated and amended at 51 FR 6111, Feb. 20, 1986]

§ 222.22 Calculation of ADA for an LEA's federally connected children for purposes of computing entitlements and payments under section 3.

(a) This section describes the manner in which the Secretary computes the average daily attendance (ADA) of federally connected children for each category in sections 3 and 4 of the Act—for the current fiscal year—in order to determine an applicant's entitlements under those sections.

(b) If an LEA is in a State that collects actual ADA data for purposes of distributing State aid for education, the Secretary calculates the ADA of that LEA's federally connected children for the current fiscal year by—

(1) Except as provided in paragraph (b)(2) of this section—

(i) Dividing the ADA of all the LEA's children for the prior fiscal year by the LEA's total membership on its survey date for the prior fiscal year (or, in the case of an LEA that conducted two membership counts in the prior fiscal year, by the average of the LEA's total membership on the two survey dates); and

(ii) Multiplying the figure determined in paragraph (b)(1)(i) of this section by the LEA's total membership of federally connected children in each subcategory described in section 3 of the Act on the LEA's survey date for the current fiscal year (or, in the case of an LEA that conducts two membership counts in the current fiscal year, by the average of the LEA's total membership of federally connected children in each subcategory on the two survey dates).

(2)(i) For purposes of this section, "actual ADA" means raw ADA data that have not been weighted or adjusted to reflect higher costs for specific types of students for purposes of distributing State aid for education.

(ii) If an LEA provides a program of free public summer school, attendance data for the summer session are included in the LEA's ADA figure in accordance with State law or practice.

(iii) An LEA's ADA count includes attendance data for children for whom it makes tuition arrangements with other educational entities.

(3) Applicants may not count attendance data for—

(i) Any child who is not physically present at school for the daily minimum time period required by the State, unless the child is participating via telecommunication or correspondence course programs that meet State standards or is being served by a State-approved homebound instruction program for the daily minimum time period appropriate for the child; or

(ii) Any child attending the schools of the applicant under a tuition arrangement with another LEA.

(c) If an LEA is in a State that does not collect ADA data for purposes of distributing State aid for education, the LEA or SEA shall submit data necessary for the Secretary to calculate the ADA of the LEA's federally connected children as follows:

(1) If an LEA is in a State that formerly collected ADA data for purposes of distributing State aid for education, the SEA may submit the total ADA and total membership data for the State for each of the last three fiscal years that ADA data were collected. The Secretary uses these data to calculate the ADA of the LEA's federally connected children by—

(i) Dividing the total ADA data by the total membership data for each of the three fiscal years and averaging the results; and

(ii) Multiplying the average determined in paragraph (c)(1)(i) of this section by the LEA's total membership of federally connected children in the current fiscal year as described in paragraph (b)(1)(ii) of this section.

(2) An LEA may collect and submit attendance data based on sampling during the prior fiscal year. The sampling must include attendance data for all children for at least 30 school days. The data must be collected during at least three periods evenly distributed throughout the school year. Each collection period must consist of at least five consecutive school days. The Secretary uses these data to calculate the ADA of the LEA's federally connected children by—

(i) Determining the ADA of all children in the sample;

(ii) Dividing the figure obtained in paragraph (c)(2)(i) of this section by the LEA's total membership for the prior fiscal year; and

(iii) Multiplying the figure determined in paragraph (c)(2)(ii) of this section by the LEA's total membership of federally connected children for the current fiscal year, as described in paragraph (b)(1)(ii) of this section.

(3) If an LEA is in a State that distributes State aid for education based on data similar to attendance data, the SEA may request that the Secretary use those data to calculate the ADA of the LEA's federally connected children. The Secretary determines whether those data are, in effect, equivalent to attendance data and, if so, allows use of the requested data and determines the method by which

the ADA of the LEA's federally connected children will be calculated.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238, 239, 240(a), 244(10))

[54 FR 37254, Sept. 7, 1989, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.23 Entitlements under section 3(e).

(a) An applicant eligible under section 3(e) of the Act is entitled to receive, for the fiscal year in which eligibility is determined and for any of the three succeeding fiscal years, not less than 90 percent of the amount to which the applicant was entitled under section 3 of the Act for the preceding fiscal year.

(b) For an applicant to be eligible under section 3(e) of the Act:

(1) The number of children determined with respect to an applicant under sections 3(a) and 3(b) of this Act must be less than 90 percent of the number of children determined under those sections of the Act for the applicant during the preceding fiscal year. In making that determination, the Secretary shall divide the current fiscal year's sections 3(a) and 3(b) ADA by the preceding fiscal year's ADA for those sections.

(2) There must have been a substantial decrease in the number of children determined under sections 3(a) and 3(b) of the Act resulting from a decrease or cessation of Federal activities, in the State within which the applicant is located, during the year for which an application is filed. A decrease is substantial when it equals 3 percent of the current fiscal year's total ADA and at least 10 in ADA.

(3) The applicant must submit a statement to the Secretary identifying the particular decrease in or cessation of Federal activities; the statement must be certified as to its accuracy by an authorized official of the Federal agency associated with the conduct of the affected activities.

(c) Any section 3(e) payments to an applicant are considered for all other purposes as payments attributable to determinations of children under section 3(b)(2)(A) of the Act.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238(e))

[40 FR 16032, Apr. 8, 1975. Redesignated at 45 FR 77368, Nov. 21, 1980. Redesignated at 51 FR 6111, Feb. 20, 1986, and amended at 53 FR 49143, Dec. 6, 1988]

§ 222.24 Payments under section 4(a).

(a) Payment under section 4(a) is intended to compensate a local educational agency for sudden and substantial increases in pupils whose attendance in school during the current school year is a direct result of Federal activities. This payment may be made only when the Secretary determines that, although the applicant has made a reasonable tax effort, the education of the increased number of children places a substantial and continuing financial burden on the applicant, and the applicant cannot secure funds from other sources adequate to provide these children a level of education equivalent to that maintained in generally comparable school districts in the same State.

(b) In the first fiscal year following payment under section 4(a), a payment not to exceed 50 percent of the entitlement in this preceding year under section 4(a) will be made, subject to the availability of funds. The payment may not include any entitlement due to those increases in section 3(a) or 3(b) of the preceding year for which payment was made.

(Authority: 20 U.S.C. 239(a))

(c) No payments will be made under section 4(a) of the Act unless:

(1) The increase in ADA of federally-connected pupils in the current year over the ADA of those children in the preceding year is at least equal to 5 percent of non-Federal ADA in the preceding year, and

(2) The increase in the current total ADA over the preceding year's total ADA is at least 5 percent of the preceding year's total ADA.

(Authority: 20 U.S.C. 293(a)(1))

(d) No payments will be made under section 4(a) of the Act unless the parents of the pupils entering the schools of the local educational agency for the first time during the current school year enter the area of that agency to accept employment because of Federal activities on or after February 1 of the preceding year. An increase in activities of the United States for the purpose of section 4(a) of the Act may be found to have occurred in circumstances which include the following:

(1) Activities resulting from Federal contracts in the current fiscal year when the number of employees engaged in the Federal activity increased over the preceding fiscal year; and

(2) Activities where production resulting from Federal contracts changed so as to require employees with new skills for this production; therefore, new employees migrated into the area of the local educational agency.

(e) Activities of those persons not employed by the United States or by a contractor of the United States shall not be considered to be a direct result of activities of the United States for the purposes of section 4(a).

(Authority: 20 U.S.C. 239(a)(1); 83-703, House Report No. 703, July 3, 1953, 12)

[40 FR 16032, Apr. 8, 1975. Redesignated at 45 FR 77366, Nov. 21, 1980. Redesignated at 51 FR 6111, Feb. 20, 1986]

§ 222.25 Election under section 4(c).

Under section 4(c) of the Act, a local educational agency may elect to count for eligibility and payment under section 4(a) of the Act the entire increase in the number of children who are:

(a) In average daily attendance at its schools during the school year; and

(b) Otherwise eligible to be counted under section 3 of the Act. This election may be made only if an application under section 4 is filed in a timely manner in accordance with § 222.10.

(Approved by the Office of Management and Budget under control number 1880-0036)

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 239(c))

[40 FR 16032, Apr. 8, 1975. Redesignated at 45 FR 77368, Nov. 21, 1980. Redesignated and amended at 51 FR 6111, Feb. 20, 1986, 53 FR 49143, Dec. 6, 1988; 54 FR 47076, Nov. 9, 1989]

Subpart D—Generally Comparable Local Educational Agencies; Local Contribution Rates

§ 222.30 Determination of local contribution rates: general.

(a) In order to compute the amount to be paid to an applicant local educational agency (LEA) under section 3 of the Impact Aid program, the Secretary—after consultation with the LEA and its State educational agency (SEA)—determines the LEA's local contribution rate.

(b) The provisions in §§ 222.31 through 222.34 describe the methods that may be recommended by LEAs to be used by the Secretary in the determination of local contribution rates.

(c) Except for § 222.32, the provisions in § § 222.31 through 222.37 do not apply to applicant LEA's located in—

(1) Puerto Rico;

(2) Wake Island;

(3) Guam;

(4) American Samoa;

(5) The Northern Mariana Islands;

(6) The Virgin Islands; and

(7) Any State in which there is only one LEA.

(Authority: 20 U.S.C. 238(d)(3))

[50 FR 33209, Aug. 16, 1985, as amended at 54 FR 37255, Sept. 7, 1989]

§ 222.31 Recommendation of local contribution rate.

An LEA shall recommend to the Secretary one of the following types of local contribution rates. If the recommended local contribution rate meets the requirements of the Act and this Part 222, the Secretary accepts the recommendation and bases the LEA's payment on that rate.

(a) *Guaranteed Minimum Rate.* (1) The LEA may recommend the local contribution rate guaranteed by the Act.

(2) The provisions governing this rate are in § 222.32.

(b) *Generally Comparable LEA Rate.* (1) The LEA may recommend a local contribution rate based on appropriate data from generally comparable LEAs within its State.

(2) The provisions governing this rate are in §§ 222.33 through 222.35.

(c) *"Hold-Harmless" Rate for FY 1984.* (1) For fiscal year (FY) 1984 only, an LEA that was paid on a rate above the rate guaranteed by the Act in FY 1981 may recommend a rate 37.57 percent greater than its FY 1981 rate.

(2) To compute the amount of a rate under paragraph (c)(1) of this section, multiply the FY 1981 section 3 local contribution rate by 1.3757.

(3) If, during FY 1981, the LEA received additional assistance under section 3(d)(2)(B) or 3(d)(3)(B)(ii) of the Act as well as a regular payment under section 3, the LEA may apply the 37.57 percent increase only to the rate used for determining its regular payment under section 3 for FY 1981.

(d) *"Hold-harmless" Rate for FY 1985 and Subsequent Years.* (1) If the generally comparable LEA method described in § 222.33 results in a regular section 3 rate for the current fiscal year that is at least 10 percent less than an applicant's prior fiscal year regular section 3 rate, the applicant may recommend that its rate for the current fiscal year be 90 percent of its prior fiscal year rate.

(2) To compute the amount of a rate under paragraph (d)(1) of this section, multiply the prior fiscal year section 3 local contribution rate by .90.

(3) If, during the prior fiscal year, the LEA received additional assistance under sections 3(d)(2)(B) or 3(d)(3)(B)(ii) of the Act as well as a regular payment under section 3, the LEA may apply the .90 multiplier only to the rate used for determining its regular payment under section 3 for the prior fiscal year.

(Authority: 20 U.S.C. 238(d)(3), 242(b))

[50 FR 33209, Aug. 16, 1985, as amended at 54 FR 37255, Sept. 7, 1989]

§ 222.32 Local contribution rate guaranteed by the Act.

(a) Except as provided in paragraphs (b) and (c) of this section, the local contribution rate guaranteed by the Act is the greater of—

(1) Fifty percent of the average per pupil expenditure in the LEA's State during the second fiscal year preceding the fiscal year for which the local contribution rate is being computed; or

(2) Fifty percent of the average per pupil expenditure in all of the 50 States and the District of Columbia during the second fiscal year preceding the fiscal year for which the local contribution rate is being computed.

(b) If a rate resulting from paragraph (a)(2) of this section exceeds 100 percent of the average per pupil expenditure in the LEA's State for the second fiscal year preceding the fiscal year for which the local contribution rate is being computed, the Secretary approves a local contribution rate that is equal to that State's average per pupil expenditure for the second preceding fiscal year.

(c)(1) For FY 1988 and each fiscal year thereafter, the Act guarantees a special local contribution rate, as described in paragraph (c)(3) of this section, for certain LEA's whose boundaries are coterminous with the boundaries of a military installation ("coterminous LEA's").

(2) LEA's that qualify for the special guaranteed rate under paragraph (c)(3) of this section include all coterminous LEA's except—

(i) Any coterminous LEA located in a State in which the State equalization law would prohibit the LEA from retaining the additional funds resulting from a rate described in paragraph (c)(3) or (c)(4) of this section; and

(ii) Any coterminous LEA located in a State in which the State law would require that State aid to the LEA for free public education be reduced in proportion to the additional funds resulting from a rate described in paragraph (c)(3) or (c)(4) of this section.

(3) For any coterminous LEA that qualifies under paragraph (c)(2) of this section, the Act guarantees a local contribution rate that is 70 percent of the average per pupil expenditure in all of the 50 States and the District of Columbia during the second fiscal year preceding the fiscal year for which the local contribution rate is being computed unless that rate would raise the LEA's per pupil expenditure for the second preceding fiscal year above the State average per pupil expenditure for the second preceding

fiscal year, in which case the LEA's rate is determined under paragraph (c)(4) of this section.

(4) If the rate described in paragraph (c)(3) of this section would raise the LEA's per pupil expenditure for the second preceding fiscal year above the State average per pupil expenditure for the second preceding fiscal year, then the LEA receives the greater of—

(i) The rate necessary to raise the per pupil expenditure for that LEA for the second preceding fiscal year to the average per pupil expenditure in the LEA's State for the second preceding fiscal year; or

(ii) The rate described in paragraph (a)(½) of this section.

(Authority: 20 U.S.C. 238(d)(3) (B) and (h))

[50 FR 33209, Aug. 16, 1985, as amended at 54 FR 37255, Sept. 7, 1989]

§ 222.33 Identification of generally comparable LEAs.

(a) If an LEA wishes to recommend to the Secretary a rate based on appropriate data from generally comparable LEA's within its State, the SEA for that State shall, except as provided in § 222.36, use data from the second fiscal year preceding the fiscal year for which the local contribution rate is being computed to group all of its LEA's, including all applicant LEA's, as follows:

(1) *Grouping by Grade Span/Legal Classification Alone.* Divide all LEAs into groups that serve the same grade span and then subdivide the grade span groups by legal classification, if the Secretary considers this classification relevant and sufficiently different from grade span within the State. As an alternative grade-span division, after consultation with the applicant LEAs in the State, divide all LEAs into elementary, secondary, or unified grade-span groups, as appropriate, within the State.

(2) *Grouping by Grade Span/Legal Classification and Size.* (i) Divide all LEA's into groups by grade span (or the alternative grade-span groups described in paragraph (a)(1) of this section) and legal classification, if relevant and sufficiently different from grade span and size.

(ii) List all LEAs within each group in descending order by size as measured by average daily attendance (ADA), placing the LEA with the *largest* ADA at the top of the list. A State that does not tabulate actual annual ADA shall use the same formula for establishing ADA for the purpose of ranking LEAs by size as the Department of Education has approved for the purpose of calculating section 3 payments for applicant LEAs in the State.

(iii) After consultation with the applicant LEAs in the State, divide each group into either two subgroups or three subgroups.

(iv) To determine the subgroups, divide each list at the point(s) that will result in as nearly equal numbers of LEAs in each subgroup as possible, so that no group is more than one LEA larger than any other group.

(3) *Grouping by Grade Span/Legal Classification and Location.* Divide all LEAs into groups by grade span (or the alternative grade-span groups described in paragraph (a)(1) of this section) and, if relevant and sufficiently different from grade span and location, legal classification; then subdivide these groups by location, as determined by placement inside or outside a metropolitan statistical area (MSA) as defined by the U.S. Bureau of the Census. The Department of Education will supply SEAs with lists of MSA classifications for their LEAs, and only the classifications on those lists will be recognized by the Department for the purposes of these regulations.

(4) *Grouping by Grade Span/Legal Classification, Size, and Location.* (i) Divide all LEAs into groups by grade span (or the alternative grade-span groups described in paragraph (a)(1) of this section) and, if relevant and sufficiently different from grade span, size, and location, legal classification; then subdivide these groups by size (into two or three subgroups for each grade span, as described in paragraph (a)(2) of this section); and further subdivide these groups by location (inside or outside an MSA).

(ii) In using both the size and location factors, the SEA shall subdivide according to the size factor before the location factor.

(b) After applying the following restrictions, the SEA shall compute a local contribution rate according to the provisions of § 222.35 for each group of generally comparable LEAs identified under paragraph (a) of this section:

(1) The SEA shall not, when computing a local contribution rate, include the following heavily impacted LEAs in any group of generally comparable LEAs:

(i) Any LEA having—in the second fiscal year preceding the fiscal year for which the local contribution rate is being computed—20 percent or more of its ADA composed of children identified under section 3(a) of the Act.

(ii) Any LEA having—in the second fiscal year preceding the fiscal year for which the local contribution rate is being computed—50 percent or more of its ADA composed of children identified under section 3(b) of the Act, or under both sections 3(a) and 3(b) of the Act.

(2) Except as provided in § 222.36, the SEA may not compute a local contribution rate for any group that contains fewer than 10 LEA's.

(c)(1)(i) In the case of an applicant LEA that satisfies the requirements contained in paragraph (c)(2) of this section, the SEA, in consultation with the LEA, may select a subgroup of 10 or more generally comparable LEAs from the group identified under paragraph (a)(2) of this section that includes the applicant LEA.

(ii) An LEA that otherwise meets either of the requirements of paragraph (c)(2) of this section but serves a different span of grades from all other LEAs in its State (and therefore cannot match any group of generally comparable LEAs under paragraph (a)(2) of this section) must be matched, for purposes of this paragraph (c) only, to a group using legal classification and size as measured by ADA. The group identified using legal classification and size will be the applicant's group under paragraph (a)(2) for purposes of this paragraph (c) only.

(2) In order to qualify under paragraph (c)(1) of this section, an applicant LEA must either:

(i)(A) Be located entirely on Federal land; and

(B) Be raising either no local revenues or an amount of local revenues the Secretary determines to be minimal; or

(ii)(A) Be located in a State where State aid makes up no more than 40 percent of the State average per pupil expenditure in the second fiscal year preceding the fiscal year for which the local contribution rate is being computed:

(B) Have federally connected children identified in the current year under section 3(a) of the Act equal to at least 20 percent of its total ADA; and

(C) Have federally connected children identified in the current year under both sections 3(a) and 3(b) of the Act equal to at least 50 percent of its total ADA.

(3) In the case of an applicant LEA that meets either of the requirements contained in paragraph (c)(2) of this section, the SEA, in consultation with the LEA, may select 10 or more generally comparable LEAs that share one or more common factors of general comparability with the eligible applicant LEA, as follows:

(i)(A) The SEA shall consider one or more generally accepted, objectively defined factors that affect the applicant's cost of educating its children. Examples of such cost-related factors include location inside or outside an MSA, sparsity of population, an unusually large geographical area, economically depressed area, low-income families, handicapped children, neglected or delinquent children, low-achieving children, children with limited English proficiency, and minority children.

(B) The SEA shall not consider cost-related factors that can be varied at the discretion of the applicant LEA or its generally comparable LEAs or factors dependent on the wealth of the applicant LEA or its generally comparable LEAs. Examples of factors that shall not be considered include special alternative curricular programs, pupil-teacher ratio, and per pupil expenditures.

(ii) The SEA shall apply the factor(s) of general comparability reccommended under paragraph (c)(3)(i) of this section in one of the following ways in order to identify 10 or more generally comparable LEAs for the eligible applicant LEA, none of which may be heavily impacted LEAs:

(A) The SEA identifies all of the LEAs in the group that the eligible applicant LEA belongs to under paragraph (a)(2) of this section that share the recommended factor(s). If the subgroup containing the eligible applicant LEA includes at least 10 other LEAs (excluding heavily impacted LEAs), it will be the eligible applicant LEA's new group of generally comparable LEAs The local contribution rate for the eligible applicant LEA shall be computed using the data for all of the LEAs in the subgroup except the eligible applicant LEA.

EXAMPLE. An eligible applicant LEA contains a designated economically depressed area, and the SEA recommends "economically depressed area" as an additional factor of general comparability. From the group of LEAs under paragraph (a)(2) of this section that includes the eligible applicant LEA, the SEA identifies two subgroups, those LEAs that contain a designated economically depressed area and those that do not. The entire subgroup identified by the SEA that includes the eligible applicant LEA is that LEA's new group of generally comparable LEAs if it contains at least 10 LEAs.

(B) The SEA identifies all of the LEAs in the group that the eligible applicant LEA belongs to under paragraph (a)(2) of this section that share the recommended factor(s). The SEA then systematically orders all of the LEAs in the group that includes the eligible applicant LEA. The SEA may further divide the ordered LEAs into subgroups by using logical division points (e.g., the median, quartiles, or standard deviations) or a continuous interval of the ordered LEAs (e.g., a percentage or a numerical range). If the subgroup containing the eligible applicant LEA includes at least 10 other LEAs (excluding heavily impacted LEAs), it will be the eligible applicant LEA's new group of generally comparable LEAs. The local contribution rate for the eligible applicant LEA shall be computed using the data for all of the LEAs in the subgroup except the eligible applicant LEA.

EXAMPLE. An eligible applicant LEA serves an unusually high percentage of handicapped children, and the SEA recommends proportion of "handicapped children" as an additional comparability factor. From the group of LEAs under paragraph (a)(2) of this section that includes the eligible applicant LEA, the SEA lists the LEAs in descending order according to the percentage of handicapped children enrolled in each of the LEAs. The SEA divides the list of LEAs into four groups containing equal numbers of LEAs. The group containing the eligible applicant LEA is that LEA's new group of generally comparable LEAs if it contains at least 10 LEAs.

EXAMPLE. An eligible applicant LEA serves an unusually high percentage of minority children, and the SEA recommends proportion of "minority children" as an additional comparability factor. From the group of LEAs under paragraph (a)(2) of this section that includes the eligible applicant LEA, the SEA lists the LEAs in descending order according to the percentage of minority children enrolled in each of the LEAs. The SEA chooses from the list of LEAs the 15 LEAs whose percentages of minority children are closest to the eligible applicant LEAs. These 15 LEAs will be the eligible applicant LEA's new group of generally comparable LEAs.

(C) The SEA may recommend and apply more than one factor of general comparability in selecting a new group of 10 or more generally comparable LEAs for the eligible applicant LEA. If the subgroup containing the eligible applicant LEA includes at least 10 other LEAs (excluding heavily impacted LEAs), it will be the eligible applicant LEA's new group of generally comparable LEAs. The local contribution rate for the eligible applicant LEA shall be computed using the data from all of the LEAs in the subgroup except the eligible applicant LEA.

EXAMPLE. An eligible applicant LEA is very sparsely populated and serves an unusually high percentage of children with limited English proficiency. The SEA recommends "sparsity of population" and proportion of "children with limited English proficiency" as additional comparability factors. From the group of LEAs under paragraph (a)(2) of this section that includes the eligible applicant LEA, the SEA identifies all LEAs that are sparsely populated. The SEA further subdivides the sparsely populated LEAs into two groups, those that serve an unusually high percentage of children with limited English proficiency and those that do not. The subgroup of sparsely populated LEAs that serve a high percentage of children with limited English proficiency is the eligible applicant LEA's new group of generally comparable LEAs.

(4)(i) Using the new group of generally comparable LEAs selected under paragraph (c)(3) of this section, the SEA shall compute the local contribution rate for the eligible applicant LEA according to the provisions of § 222.35.

(ii) The SEA shall recommend the resulting local contribution rate to the Secretary and provide the Secretary a description of the additional factor(s) of general comparability and the data used to identify the new group of generally comparable LEAs.

(iii) The Secretary reviews the recommended local contribution rate and supporting data and accepts them if the Secretary determines that they meet the purposes and requirements of the Act and this Part 222.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238(d)(3)(A); 242(b))

[50 FR 33209, Aug. 16, 1985, as amended at 54 FR 37256, Sept. 7, 1989; 54 FR 47076, Nov. 9, 1989]

§ 222.34 Local contribution rate based on generally comparable LEAs.

(a) In selecting its recommended rate, the LEA shall use the following steps:

(1) *Step 1.* The LEA shall select the factor or factors in § 222.33 the LEA wishes to use as the basis for general comparability.

(2) *Step 2.* Using State-supplied data, the LEA shall identify within the State the entire group of LEAs (containing at least 10 LEAs exclusive of heavily impacted LEAs) that matches the factor or factors selected in step 1 and that contains the applicant LEA or would contain the applicant LEA if it were not heavily impacted.

(3) *Step 3.* The LEA shall recommend to the Secretary the local contribution rate, which the SEA has computed according to the provisions of § 222.35, based on the group identified in Step 2.

(b) A heavily impacted LEA is entitled to:

(1) Apply for assistance under the program: and

(2)(i) Recommend as its local contribution rate any type of rate described in § 222.31 for which the LEA is eligible, including a rate based on generally comparable LEAs; and

(ii) Under the generally comparable LEA method, recommend for itself the local contribution rate of any group it would be included in based on grade span/legal classification, size, and/or location, if it were not excluded as heavily impacted in paragraph (b)(1) of § 222.33.

EXAMPLE. An LEA applies for assistance under section 3 of the Impact Aid Program and wishes to recommend to the Secretary a local contribution rate based on generally comparable LEAs within its State.

Characteristics of Applicant LEA

The grade span of the applicant LEA is kindergarten through grade 8 (K-8). In the applicant's State, legal classification of LEAs is based on grade span, and thus does not act to further subdivide groups of LEAs.

The ADA of the applicant LEA is above the median ADA of LEAs serving only K-8 in the State.

The applicant LEA is located outside an MSA.

Characteristics of Other LEAs Serving Same Grade Span

The SEA of the applicant's State groups all LEAs in its State according to the factors in § 222.33.

The SEA identifies the following groups:

One hundred and one LEAs serve only K-8. The SEA has identified a group of 50 LEAs having an ADA above the median ADA for the group of 101, one LEA having an ADA at the median, and a group of 50 LEAs having an ADA below the median ADA; and according to § 222.33(a)(2)(i), the SEA considers 51 LEAs to have an ADA below the median ADA.

Of the 101 LEAs in the group, the SEA has identified a group of 64 LEAs as being inside an MSA and a group of 37 LEAs as being outside an MSA.

Among the group of 50 LEAs having an ADA above the median, the SEA has identified a group of 35 LEAs as being inside an MSA and a group of 15 LEAs as being outside an MSA.

Among the group of 51 LEAs having an ADA at or below the median, the SEA has identified a group of 29 LEAs as being inside an MSA and 22 LEAs as being outside an MSA.

One LEA has 20 percent of its ADA composed of children identified under section 3(a) of the Act and, therefore, must be excluded from any group it falls within before the SEA computes a local contribution rate for the group. The LEA has an ADA below the median ADA and is located outside an MSA.

On the basis of § 222.35, the SEA computes the local contribution rate for each group of generally comparable LEAs that the SEA has identified.

Selection of Generally Comparable LEAs

The applicant LEA selects the group of generally comparable LEAs matching the factor or factors it wishes to use as the basis for general comparability.

Under the requirements of § 222.33, the applicant LEA must begin with the group that includes all LEAs with its grade span, and, if elevant and sufficiently different, legal classification. In this case, grade span and legal classification happen to be the same. Thus, the group would include 100 LEAs, after excluding the one heavily impacted LEA.

The applicant LEA then has several options:

Option 1. The applicant LEA may select s its group of generaly comparable LEAs n which to base its recommended local contribution rate the entire group of 100 LEAs erving K-8, after excluding the one heavily mpacted LEA. The applicant LEA then recmmends to the Secretary as its local contribution rate the rate computed for this roup by the SEA.

Option 2. Instead of selecting the group of 00, the applicant LEA may select as its genrally comparable group only those LEAs ithin the 101 (the heavily impacted LEA ust be included initially for the purpose of etermining the median ADA) that have an DA above the median ADA, that is, the roup of 50. The applicant LEA then recomends to the Secretary as its local contribuon rate the rate computed for the group e the SEA.

Option 3. Instead of selecting either of e groups described in Options 1 and 2, the pplicant LEA may select as its generally mparable group only those LEAs within e 100 that are outside an MSA; that is, e group of 36, after excluding the one eavily impacted LEA. The applicant LEA en recommends to the Secretary as its al contribution rate the rate computed r this group by the SEA.

Option 4. Instead of selecting any of the roups described in Options 1 2, and 3, the pplicant LEA may select as its generally mparable group only those LEAs that oth have an ADA above the median ADA r the 101 and are outside an MSA; that is, e group of 15. The applicant LEA then ommends to the Secretary as its local contribution rate the rate computed for this group by the SEA.

However, as provided in § 222.33(b)(2), if the SEA were to have identified fewer than 10 LEAs under any factor or combination of factors, the SEA would not have computed a rate for such a group. Therefore, an applicant LEA included in such a group would not be able to use this factor or combination of factors in recommending its local contribution rate to the Secretary.

The heavily impacted LEA, while included for determining the median ADA, is excluded from the computation of any group's local contribution rate. However, the heavily impacted LEA may recommend for itself the local contribution rate of any group it matches in grade span/legal classification, size, and/or location (that is, in the case of the heavily impacted LEA referred to in this example, below the median ADA and outside an MSA), provided the group contains at least 10 LEAs that are not heavily impacted.

(Approved by the Office of Management and Budget under control number 1810-0036)

[50 FR 33209, Aug. 16, 1985, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.35 Computation of local contribution rates.

Except as otherwise specified in the Act and in § 222.36, the SEA, subject to the Secretary's review and approval, shall compute a local contribution rate for each group of generally comparable LEAs within its State that was identified using the factors in § 222.33, as follows:

(a)(1) The SEA shall compile the aggregate local current expenditures of the comparable LEAs in each group for the second fiscal year preceding the fiscal year for which the local contribution rate is being computed.

(2) For purposes of this section, the SEA shall consider only those aggregate current expenditures made by the generally comparable LEAs from revenues derived from local sources. No State or Federal funds may be included.

(b) The SEA shall compile the aggregate number of children in ADA to whom the generally comparable LEAs in each group provided a free public education during the second fiscal year preceding the fiscal year for which the local contribution rate is being computed.

(c) The SEA shall divide:

(1) The aggregate current expenditures determined under paragraph (a) of this section; by

(2) The aggregate number of children determined under paragraph (b) of this section.

(d) If a rate computed under this section is lower than the rate guaranteed by the Act, the Secretary bases the LEA's payment on the guaranteed rate.

(Authority: 20 U.S.C. 238(d)(3)(A))

[50 FR 33209, Aug. 16, 1985, as amended at 54 FR 37256, Sept. 7, 1989]

§ 222.36 Determination of additional assistance.

(a) The provisions of this section govern an LEA that applies to the Secretary for assistance under section (3)(d)(2)(B) of the Act, in addition to its application for a regular payment under section 3.

(b) An LEA that applies for funds under section 3(d)(2)(B) may have its 3(d)(2)(B) eligibility and payment based on three comparable LEAs in its State. These three comparable LEAs are identified as follows:

(1) Using data from the prior fiscal year, the SEA first follows the directions in § 222.33(a)(4). The SEA then removes from the resulting list any LEAs that are heavily impacted, as described in § 222.33(b)(1), except the applicant LEA.

(2) If the remaining LEAs are not in rank order by ADA, the SEA shall list them in that order.

(3) The LEA may then select as its generally comparable LEAs for purposes of section 3(d)(2)(B) three LEAs that are adjacent to it in size (e.g., the next three larger LEAs, the next three smaller, the next two larger and the next one smaller, or the next one larger and the next two smaller).

(4) The Secretary uses the financial data of these three LEAs and the procedures in §§ 222.130-222.132 to determine whether the applicant LEA is eligible for funding under section 3(d)(2)(B) and, if so, the amount of that funding.

(c) If an LEA does not choose to exercise the option offered by paragraph (b) of this section and if it is applying for a regular payment under section 3 based on a local contribution rate guaranteed by the Act, the Secretary—

(1) In determining the applicant LEA's eligibility for, and the amount of, any additional assistance, considers the LEA comparable to all LEAs in its State; and

(2) Uses prior year data and the procedures in §§ 222.130-222.132 to determine whether the applicant LEA is eligible for funding under section 3(d)(2)(B) and, if so, the amount of that funding.

(d) If an LEA does not choose to exercise the option offered by paragraph (b) of this section and if, in applying for a regular payment under section 3, it recommends a local contribution rate based on generally comparable LEAs in its State, the Secretary—

(1) In determining the applicant LEA's eligibility for, and the amount of, any additional assistance, considers as comparable LEAs the same LEAs that the applicant identifies as comparable in its application for a regular payment under section 3; and

(2) Uses prior year data and the procedures in §§ 222.130-222.132 to determine whether the applicant LEA is eligible for funding under section 3(d)(2)(B) and, if so, the amount of that funding.

(e) If an LEA does not choose to exercise the option offered by paragraph (b) of this section and if, in applying for a regular payment under section 3, it recommends the "hold-harmless" rate described in § 222.31(d), the Secretary—

(1) In determining the applicant LEA's eligibility for, and the amount of, any additional assistance, considers as comparable LEAs the group of LEAs that produces the highest regular section 3 rate under the generally comparable LEA method, as described in § 222.33; and

(2) Uses prior year data and the procedures in §§ 222.130-222.132 to determine whether the applicant LEA is eligible for funding under section 3(d)(2)(B) and, if so, the amount of that funding.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238(d)(2)(B), 242(b))

[54 FR 37256, Sept. 7, 1989, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.37 Determination of compensation for unusual geographical factors.

(a) An applicant LEA is eligible for an increased local contribution rate under this section if that LEA is unable to provide a level of education equivalent to that provided by the generally comparable LEAs on which the applicant's local contribution rate is based because—

(1) The applicant's current expenditures are affected by unusual geographical factors; and

(2) As a result, those current expenditures are not reasonably comparable to the current expenditures of the generally comparable LEAs.

(b) The Secretary determines whether an applicant LEA meets the eligibility criteria in paragraph (a) of this section based upon the data provided by the applicant under paragraph (d) of this section.

(c) If the Secretary determines that an applicant LEA meets the eligibility criteria in paragraph (a) of this section, the Secretary increases the applicant's local contribution rate as follows:

(1) Except as provided in paragraph (c)(2) of this section, the Secretary increases the applicant LEA's local contribution rate up to the amount the Secretary determines will compensate the applicant for the increase in its current expenditures necessitated by the unusual geographical factors, but no more than is necessary to allow the applicant to provide a level of education equivalent to that provided by its generally comparable LEAs.

(2) The amount of the increased payment referred to in paragraph (c)(1) of this section may not exceed the per pupil share (computed with regard to all children in average daily attendance), as determined by the Secretary, of the increased current expenditures necessitated by the unusual geographical factors referred to in paragraph (a)(1) of this section.

(d) When applying for compensation under this section, an applicant shall provide the Secretary the following information:

(1) A specific description of the unusual geographical factors on which the applicant is basing its request for compensation under this section, and objective data demonstrating that the applicant is more severely affected by these factors than any other LEA in its State;

(2) Objective data demonstrating the specific ways in which the unusual geographical factors affect the applicant's current expenditures so that they are not reasonably comparable to the current expenditures of the generally comparable LEAs on which the applicant's local contribution rate is based;

(3) Objective data demonstrating the specific ways in which the unusual geographical factors prevent the applicant from providing a level of education equivalent to that provided by the generally comparable LEAs on which the applicant's local contribution rate is based;

(4) Objective data demonstrating that the applicant's fiscal effort per student based on expenditures of State and local revenues for the provision of free public education in the preceding fiscal year was at least equal to the same fiscal effort per student for the second preceding fiscal year; and

(5) Any other information that the Secretary may reasonably require to make the determination under paragraph (a) of this section.

(e) The Secretary does not provide compensation under section 3(d)(3)(B)(ii) to an applicant in a State that takes such compensation into account in an equalization program that qualifies under section 5(d)(2) of the Act.

(f) The Secretary does not provide compensation under section 3(d)(3)(B)(ii) unless an applicant is determined to be making a reasonable tax effort in accordance with §§ 222.124–222.129.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238(d)(3)(B)(ii); 242(b))

[50 FR 33209, Aug. 16, 1985, as amended at 53 FR 39019, Oct. 4, 1988; 54 FR 37256, Sept. 7, 1989; 54 FR 51881, Dec. 19, 1989]

Subpart E—Records and Reports Required by the Secretary

§ 222.40 Maintenance of records.

(a) An LEA shall maintain adequate written records to prove its entitlement to whatever amount of payment it received under this part for any fiscal year.

(b) On request the LEA shall make its records available to the Secretary for the purpose of examination or audit.

(c) Each applicant shall submit such reports and information as the Secretary may reasonably require to determine the amount which the applicant may be paid under sections 2, 3, or 4 of the Act.

(Approved by the Office of Management and Budget under control number 1880-0036)

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 237, 238, 239, 240, 242(b))

[40 FR 16032, Apr. 8, 1975. Redesignated at 45 FR 77368, Nov. 21, 1980. Redesignated at 51 FR 6111, Feb. 20, 1986, and amended at 53 FR 5555, Feb. 24, 1988; 53 FR 49143, Dec. 6, 1988; 54 FR 47076, Nov. 9, 1989]

§ 222.41 Retention of records.

An LEA shall retain all the records referred to in § 222.40(a) until the later of the following:

(a) Five years after the end of each fiscal year for which funds were received.

(b) If the records have been questioned on Federal audit or review, until the question is finally resolved and the necessary adjustments to payments have been made.

(Authority: 20 U.S.C. 237, 238, 239, 240, 242(b))

[51 FR 6111, Feb. 20, 1986]

§ 222.42 Adjustment for or recovery of overpayment.

Except as otherwise provided in § 222.103, the Secretary adjusts for and recovers overpayments as follows:

(a) If the Secretary determines tha an LEA has received a payment i excess of what it should have receive under the Act and this part, the Secretary deducts the amount of the overpayment from subsequent payment to which the LEA is entitled under th Act.

(b)(1) If the LEA is not entitled t subsequent payments under the Act the LEA shall promptly refund th amount of the overpayment to th Secretary.

(2) If the LEA does not promptl repay the amount of the overpaymen or promptly enter into a repaymen agreement with the Secretary, the Secretary may use the procedures se forth in the regulations contained i 34 CFR Part 30 to offset that amoun against other Department program or, under the circumstances permitted in Part 30, to request that another agency offset the debt.

(Authority: 20 U.S.C. 237, 240, 242(b) 1226a-1)

[51 FR 6111, Feb. 20, 1986, as amended at 5 FR 5555, Feb. 24, 1988; 54 FR 37256, Sept. 7 1989]

§ 222.43 Information submitted afte deadlines.

(a) *General.* Except as indicated in paragraph (b) of this section, the Secretary does not consider information submitted by an applicant after the deadlines prescribed in Subpart B for submission of applications and amendments to applications.

(b) *Information solicited by the Secretary.* After the deadlines prescribed in Subpart B the Secretary may solicit from the applicant, in writing, additional clarifying information for the purpose of processing an application.

(Authority: 20 U.S.C. 240, 242(b))

[51 FR 6112, Feb. 20, 1986]

§ 222.44 Reports from other Federal agencies.

Because of the requirements of section 2 and other provisions of the Act the Secretary requires information with respect to certain payments made by other Federal departments and agencies for the same general purposes. Pursuant to the provisions of section 402(b) of the Act, other Federal departments and agencies which made expenditures (directly or otherwise) for, or in aid or supplementation of elementary and secondary education with respect to which an application has been filed with the Secretary, will be requested to file reports of commitments and expenditures for such purposes.

(Authority: 20 U.S.C. 243(b))

[40 FR 16032, Apr. 8, 1975. Redesignated at 45 FR 77368, Nov. 21, 1980. Redesignated at 51 FR 6112, Feb. 20, 1986]

Subpart F—Arrangements Under Section 6 of the Act

§ 222.50 Arrangements under section 6(a).

(a) Children who reside on Federal property shall be educated whenever possible in schools operated and controlled by local educational agencies (in accordance with State laws and standards).

(b) Insufficient funding under section 3 of the Act does not provide adequate justification for the making of arrangements under section 6(a) of the Act.

(c) In appropriate instances, when arrangements are made under section 6(a) of the Act, the provisions of section 6(f) shall be applied.

(d) To the extent practicable, the Secretary will limit such payments to that of the per pupil cost provided for children in comparable communities in the State. In order to establish such cost, the agency or department proposing the arrangements must submit the per pupil cost data for the following agencies:

(1) The local educational agency in which all or part of the Federal property where the children reside and for which a proposal is being submitted is located, or, if the Federal property is not located within a local educational agency, one of the local educational agencies contiguous to such Federal property;

(2) The local educational agency in which the capital city of the State is located; and

(3) From one to three additional local educational agencies thought to be generally comparable to that of the schools affected by the proposal.

(Authority: 20 U.S.C. 241(a); House Report No. 81-2287, June 20, 1950, 22-23)

§ 222.51 Arrangements under section 6(b).

(a) When the Secretary makes arrangements under section 6(a) of the Act, the Secretary will under appropriate circumstances also make arrangements for those children for whose education he is authorized to make provisions under section 6(b) of the Act.

(b) Where a parent residing on the Federal property is transferred and the family moves from housing on Federal property to housing in an area adjacent to the Federal property, the dependent children will be permitted, as determined by the Secretary, to continue in attendance at the section 6 school for the remainder of the fiscal year provided that they continue to reside in such adjacent area. Where a parent is assigned to a Federal property on which there is a section 6 school and is assigned family housing on Federal property which the operating Federal agency certifies will be available for occupancy and will be occupied within ninety (90) days from the official reporting date of such parent, the dependent children may be permitted to attend the section 6 school while residing in an area adjacent to such Federal property for the portion of the ninety-day period as required by such residence.

(Authority: 20 U.S.C. 241(b))

§ 222.52 Arrangements under section 6(c).

(a) When the Secretary makes arrangements under section 6(a) of the Act, the Secretary will under appropriate circumstances also make arrangements in connection therewith for those children for whose education he is authorized to make provision under section 6(c) of the Act.

(b) Children may be permitted to attend the section 6 schools under the provisions of section 6(c) upon submission of a proper proposal approved by the Secretary. Such children may include only:

(1) Children of a parent employed by the United States in Puerto Rico under the following conditions:

(i) The employing Federal agency has a policy of transfer or reassignment of personnel who occupy the same or similar grade, position, or classification of the parent and the parent is subject to such policy;

(ii) Such agency normally makes reassignments or transfers of such employees to places where English is the language of instruction in the school normally attended by children of Federal employees;

(2) Children of a federally employed parent if:

(i) Such parent, with his family, has been stationed in an area in which English is the language of instruction in the schools generally attended by the children of such employees;

(ii) Such parent has been assigned to a location where the family is not authorized by the employing agency to go; and

(iii) Either of the following conditions exists:

(*a*) Such parent's home of record is Puerto Rico; or

(*b*) The home of such parent or such parent's spouse was Puerto Rico prior to their marriage; and

(3) Children of a parent who is employed as a supervisor, administrator or instructional personnel in a facility for which arrangements are made pursuant to section 6 of the Act, if both of the following conditions exist:

(i) Such parent was hired in a country in which English is the primary language; and

(ii) The family of such parent migrated to Puerto Rico from an area in which English is the language of instruction in schools generally attended by children of such employees.

(Authority: 20 U.S.C. 241(c); Sen. Rept. No. 311, 89th Cong., 1st Sess., June 9, 1965, 2; H. Rept. No. 703, July 3, 1953, 83d Cong., 1st Sess., 24, 28, 67)

§ 222.53 Proposal for arrangements under section 6.

(a) Any local educational agency, or the Federal department or agency administering the Federal property on which part or all of such section 6 children reside, which believes that the Secretary should exercise the Se retary's authority under section 6 the Act to make arrangements to pr vide free public education for childr who reside on Federal property or other appropriate areas, and which willing to enter into or assist in ente ing into such arrangements, shou file a proposal with the Secretary, or before April 30 preceding the fisc year for which such arrangemen would be made.

(b) Such proposal shall be in th form prescribed by the Secretary an bear the endorsement of either th State and local educational agencies of the appropriate officials of the Fe eral department or agency administe ing the property or properties which the children reside, as appropr ate. Such proposal shall include th following:

(1) The reasons why the Secretar should make a determination to ente into such arrangements;

(2) The estimated number of chi dren to be educated;

(3) Financial and educational detai necessary for the Secretary to mak the determinations and arrangement required under section 6 of the Ac and

(4) The name of the local education al agency or Federal department agency which would provide such fre public education.

(Authority: 20 U.S.C. 241(d))

§ 222.54 Determinations by the Secretar pursuant to section 6.

If under section 6 of the Act the Sec retary determines that the Secretar is required to make such arrangement to provide free public education fo part or all of the children on whos behalf the request is made or if, actin upon information otherwise received he makes a determination to provid free public education for children wh reside on Federal property or adjacen areas, such arrangements shall b made with a local educational agenc or with the Federal department o agency administering the Federa property on which part or all of th children reside who will be provided education pursuant to the arrangements.

(Authority: 20 U.S.C. 241, 243(a))

§ 222.55 Notice of Secretary's action.

The Secretary, after his review of the proposal, will notify the responsible Federal official or the local educational agency of his action respecting the arrangements to be made and the amount of Federal funds approved for the year's operating budget. Upon receipt of such notice the agency may take appropriate action to carry out the arrangements but should not incur any binding financial obligation prior to notification that the necessary funds have been appropriated and are available. In those cases where the education is to be provided by a local educational agency, the Secretary will enter into an agreement with the agency which will specify the terms and conditions on which the education is to be provided and the basis on which the Federal payment will be made. The Secretary will prepare the agreement and send it to the local educational agency for signature.

(Authority: 20 U.S.C. 241(d))

§ 222.56 Arrangements under section 402(a).

(a) The Secretary will, pursuant to proper agreement with the applicant local educational agency and a Federal department or agency, arrange with such Federal department or agency for the utilization of services and facilities and the transfer of funds for the cost thereof in the following circumstances:

(1) The local educational agency is an applicant under section 3 of the Act, and is legally or otherwise unable to provide to children residing on Federal property the particular educational services and facilities regularly furnished its other children; or

(2) The Federal agency or department cannot legally accept compensation to provide such services and facilities.

(b) The total amount of funds transferred to cover the cost of such services and facilities will be deducted from the section 3 entitlement of the local educational agency.

(Authority: 20 U.S.C. 243(a))

§ 222.57 Expenditures.

In making such arrangements, the Secretary shall not make payments for (a) expenditures made prior to the Secretary's determination that he is required to make such arrangements; or (b) expenditures made subsequent thereto unless such expenditures are within the definition of "current expenditures" in section 403(5) of the Act or are within the general terms of the arrangements; or (c) expenditures in excess of the actual or reasonable per pupil expenditure of providing free public education in the applicable State.

(Authority: 20 U.S.C. 241)

§ 222.58 Reports.

The local educational agency or the Federal department or agency with which such arrangements are made shall make such reports to the Secretary from time to time as the Secretary may require to perform his functions under the Act.

(Authority: 20 U.S.C. 241(d), 243(b))

§ 222.59 Termination of arrangements.

Arrangements under section 6 of the Act shall be limited to provide free public education for not more than one school year. If the Secretary determines that the local educational agency or the Federal department or agency with which arrangements have been made has substantially deviated from the terms of the arrangements, the Secretary will so notify the local educational agency or the Federal department or agency concerned. If the local educational agency or the Federal department or agency does not within a reasonable time comply with the terms of the arrangements, the Secretary may terminate such arrangements without further notice.

(Authority: 20 U.S.C. 241)

§ 222.59a Elected school board required.

(a) This section applies to all schools operated with funds provided under section 6, except those which, independently of the section 6 arrangement, are governed by an elected school board as required by State or local law.

(b)(1) An agency with which the Secretary makes a section 6 arrangement shall establish an elective school board for schools assisted under that section.

(2) The agency shall empower this elective school board to oversee—review and monitor—school expenditures and operations, subject to audit procedures established by the Secretary, and other provisions of section 6 of this Subpart F.

(c) A school board established under paragraph (b) of this section must be composed of a minimum of three members elected by parents of students in attendance at the schools.

(d) The agency shall ensure the following election procedures:

(1) The parents must have adequate notice of the time and place of the election.

(2) The election must be by secret ballot and those candidates are elected who receive a plurality of the votes.

(3) Personnel employed in the schools may not be board members.

(4) Candidates for board membership must be nominated by one parent, or more, of students who are in attendance at the schools.

(Authority: 20 U.S.C. 241(g))

[40 FR 16032, Apr. 8, 1975. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 49 FR 17497; Apr. 24, 1984]

Subpart G—Determinations Under Section 5(d) (1) and (2)

SOURCE: 42 FR 15546, Mar. 22, 1977, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980

§ 222.60 Scope and purpose.

(a) *Scope.* This subpart applies to determinations made by the Secretary pursuant to section 5(d) of the Act as amended by Pub. L. 93-380, Pub. L. 94-487.

(b) *Purpose.* The sole purpose of the regulations in this subpart is to implement the provisions of section 5(d)(2) of the Act. The definitions and standards contained herein have been developed with respect to the particular intent of the amendment made to section 5(d) of the Act by sections 304(c) and 305(a)(2) of Pub. L. 93-380 and section 330(a) of Pub. L. 94-482 and should not be construed as establishing definitions and standards for any other purpose.

(Authority: 20 U.S.C. 240(d); secs. 304(c), 305(a)(2), Pub. L. 93-380, 88 Stat. 484; 120 Cong. Rec. S8505, 8507 (daily ed. May 20, 1974))

§ 222.61 Treatment of State aid programs in general

(a) *Statutory provisions.* (1) Section 5(d)(1) of the Act provides that, except as provided in section 5(d)(2), no payments may be made to any local educational agency within a State which takes into consideration payments under section 5 of the Act in determining the eligibility of any agency for State aid, or the amount of that aid, with respect to free public education during the fiscal year of those payments or the preceding fiscal year, or which makes aid available in such a manner as to result in less State aid to any agency which is eligible for payments under the Act than that agency would receive if it were not so eligible.

(2) Section 5(d)(2) of the Act provides that, if a State has in effect a program of State aid for free public education for any fiscal year, which is designed to equalize expenditures for free public education among the local educational agencies of that State, payments under the Act (except the increase in payments described in sections 3(d)(2)(B), 3(d)(2)(C), 3(d)(2)(D) and 3(d)(3)(B)(ii) of the Act) may be taken into consideration by that State in determining (i) the relative financial resources available to local educational agencies in that State and (ii) the relative financial need of those agencies for the provision of free public education for children served by those agencies, subject to the provisions in that section.

(3) Section 5(d)(2)(A)(ii) of the Act provides that, if a State takes payments under the Act into consideration in accordance with section 5(d)(2), the State may do so only to the extent of the proportion that the local revenues of a local educational agency covered under the equalization part of a State aid program are of that agency's total local revenues for education.

(Authority: 20 U.S.C. 240(d); H.R. Rep. No. 94-1701, 235 (1976))

(b) *General rules.* (1) A State may take into consideration payments under the Act in allocating State aid if that State has a program of State aid that qualifies under § 222.62, except as follows:

(i) Those payments may be taken into consideration for each affected local educational agency only in the proportion described in § 222.66.

(ii) A State may not take into consideration increases in payment under the following sections of the Act:

(A) Section 3(d)(2)(B) (increase for heavily impacted local educational agencies).

(B) Section 3(d)(2)(C) (increase for handicapped children and children with specific learning disabilities).

(C) Section 3(d)(2)(D) (increase for children residing on Indian lands).

(D) Section 3(d)(3)(B)(ii) (increase for unusual geographical factors).

(iii) No program of State aid may qualify under this subpart if a court of that State has determined by final order, not under appeal, that such program fails to equalize expenditures for free public education among local educational agencies within the State or otherwise violates law.

(2) The Secretary will not interpret any of the provisions of §§ 222.62, 222.63, and 222.65 so as to consider any part of a State aid program which allocates funds for the additional cost of providing free public education for children with special educational needs as disequaliziang expenditures for free public education. For the purposes of this subpart, children with special educational needs are handicapped children, non-English speaking children, economically disadvantaged children, gifted and talented children and the like

(Authority: 20 U.S.C. 240(d)(2); 20 U.S.C. 242(b))

(3) No State, whether or not it has an equalization program that qualifies under § 222.62, may, in allocating State aid, take into consideration a local educational agency's eligibility or entitlement for payments under the Act if that local educational agency does not apply for and receive those payments.

(4) Any State that takes into consideration payments under the Act in accordance with the provisions of section 5(d)(2) in allocating State aid to local educational agencies must reimburse any local educational agency for any amounts taken into consideration for any fiscal year to the extent that the local educational agency did not in fact receive payments in those amounts during that fiscal year.

(Authority: 20 U.S.C. 240(d) (1) and (2))

(c) *Data for determinations.* Determinations under this subpart requiring the submission of financial or school population data may be made either (i) on the basis of data for the fiscal year preceding the fiscal year of determination if the same program was then in effect; or (ii) on the basis of estimates of data for the fiscal year of determination. Data submitted shall be the most currently available and complete data, whether based on revenues or current expenditures. Estimates submitted by a State educational agency or other appropriate State agency must set forth the assumptions upon which such estimates are founded, must be accompanied by an assurance as to their accuracy, and must be adjusted by actual data for the fiscal year of determination as soon as available for the purpose of verification.

(Authority: 20 U.S.C. 240(d); 242(d))

(d) *Definitions.* For the purposes of this subpart, the following terms shall have the meanings indicated below:

(1) "State aid" means any contribution, no repayment for which is expected, which is made by a State to or on behalf of local educational agencies within the State for current expenditures in the provision of free public education;

(2) "Equalize expenditures" means to meet the standards set forth in § 222.62;

(3) "Current expenditures" means the total charges incurred for the benefit of the school year in an elementary or secondary school program, exclusive of capital outlay and debt service for capital outlay;

(4) "Revenue" means an addition to assets which does not increase any liability, does not represent the recovery of an expenditure, does not represent the cancellation of certain liabilities without a corresponding increase in other liabilities or a decrease in assets, and does not represent a contribution of fund capital in food service or pupil activity funds. Futhermore, for the purposes of this subpart, the term "revenue" includes only revenue for current expenditures.

(Authority: 20 U.S.C. 240(d)(2))

[42 FR 15546, Mar. 22, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 39020, Oct. 4, 1988; 54 FR 37256, Sept. 7, 1989; 54 FR 51882, Dec. 19, 1989]

§ 222.62 General qualifying standard for State aid programs.

General standard. For the purposes of section 5(d)(2) of the Act, the Secretary will consider a program of State aid to be designed to equalize expenditures for free public education among local educational agencies in that State if the program—

(a) Is authorized by State law in effect for the fiscal year for which the determination under this subpart is made;

(b) Provides for the appointment of State aid among local educational agencies in the State in order to carry out the objectives of the programs;

(c) Provides that in determining the amount to be apportioned to each local educational agency in the State, the State will take into consideration the relative financial resources available to local educational agencies in that State for the program; and

(d) Meets the standard of either § 222.63, § 222.64 or § 222.65 of this subpart.

[42 FR 18279, Apr. 6, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980]

§ 222.63 Disparity standard.

(a) *25 percent disparity limitation.* The Secretary will consider a program of State aid to have fulfilled the requirement of § 222.62(d) of this subpart if the disparity in the amount of current expenditures or revenue per pupil for free public education among local educational agencies in the State is no more than 25 percent for the fiscal year for which a determination is made under this subpart. The method for calculating the percentage of that disparity in a State is set out in the appendix to this subpart.

(b) (1) *Weighted average disparity for different grade level groups.* If a State requests it, the Secretary will make separate disparity computations for different groups of local educational agencies in the State which have similar grade levels of instruction.

(2) In those cases, the weighted average disparity, based on the proportionate number of pupils in each group, may not be more than 25 percent for all the groups. The method for calculating the weighted average disparity percentage is set out in the appendix to this subpart.

(c) *Per pupil figure computations.* In calculating the current expenditures or revenue disparities under this section, computations of per pupil figures are made on the following bases:

(1) Except as provided in paragraph (c)(2) of this section, the per pupil amount of current expenditures or revenue for a local educational agency is computed on the basis of the total number of pupils receiving free public education in the schools of the agency. The total number of pupils is determined in accordance with whatever standard measurement of pupil count is used in the State.

(2) If a State aid program uses a "weighted pupil," a "classroom," "instructional unit," or other designated unit of need in determining allocations of State aid in order to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made on those bases. There are two allowable categories of special cost differentials: (i) Those associated with pupils having special educational needs, such as handicapped children, economically disadvantaged children, non-English speaking children, and gifted and talented children; and (ii) those associated with sparsity or density of population, cost of living, or special socioeconomic characteristics within the area served by an agency.

(d) *Revenues and current expenditures included in determinations.* The following revenues or current expenditures must be included for each local educational agency in the State in determining the percentage of disparity under paragraph (a) of this section:

(1) All revenues or current expenditures from State sources, except those applied or contributed outside any equalized part of the State aid program which are designated for special cost differentials of the type specified in paragraph (c)(2) of this section.

(2) All revenues for current expenditures from local or intermediate sources, except those taken into consideration under any equalized part of the State aid program which are designated for special cost differentials of the type specified in paragraph (c)(2) of this section.

(3) Pub. L. 81-874 funds received by the agency under sections 2, 3 and 4 of the Act, except to the extent that (i) they are not taken into consideration under the State aid program, and (ii) they exceed the proportion of those funds that the State would be allowed to take into consideration under § 222.66 of this subpart; and

(4) Any other Federal funds received by the agency for which the agency is not accountable to the Federal Government for their use such as Federal Forest Reserve funds (16 U.S.C. 500).

(Authority: 20 U.S.C. 240(d)(2))

[42 FR 15546, Mar. 22, 1977, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 54 FR 37257, Sept. 7, 1989]

§ 222.64 Wealth neutrality test.

(a) *General rule.* (1) The Secretary will consider a State aid program to have met the requirement of § 222.62(d) if no less than 85 percent of the total State, intermediate, and local revenues for current expenditures for all local educational agencies in the State are wealth neutral revenues for the Fiscal Year for which a determination is made under this subpart.

(2) Paragraphs (b) and (c) of this section set forth rules for determining which State, intermediate, and local revenues are "wealth neutral revenues."

(3) With respect to calculations under paragraph (c) of this section, extra yields due to special cost differentials established under State law are considered wealth neutral. There are two allowable categories of special cost differentials:

(i) Those associated with pupils having special educational needs, such as handicapped children, economically disadvantaged children, and gifted and talented children; and

(ii) Those associated with sparsity or density of population, cost of living, or special socioeconomic characteristics within the area served by an agency.

(b) *General definition.* "Wealth neutral revenues" are those revenues received by a local educational agency which are not derived from any wealth advantage that a local education agency may have over any other agency in a State.

(c) *Rules of application.* (1) All State and local revenues considered under a State school finance equalization program are wealth neutral to the extent that each local educational agency receives the same amount of dollars per pupil under that program for the same tax effort and is allowed by the State to spend as much per pupil as any other local educational agency in the State under the program. Revenues in excess of those determined to be equally available to all local educational agencies under the program are not wealth neutral except those for special cost differentials specified in paragraph (a)(3) of this section.

Example No. 1. An equalization program requires all local educational agencies to contribute the yield of a 10 mill property tax to the equalization program. The State contributes to each local educational agency an amount that when combined with the local contribution provides an amount of $1,000 per pupil. If no local educational agency receives more or less than $1,000 per pupil under the program, then that amount per pupil in all local educational agencies is wealth neutral. If some local educational agencies earn more than $1,000 per pupil from the 10 mill tax and are allowed to spend those excess revenues, then those excess revenues are not wealth neutral.

Example No. 2. If, under the program described in Example No. 1, the State restricts budget, expenditures, or tax effort increases so that some local educational agencies receive less than $1,000 under the program, amounts above the least amount received by any local educational agency are not wealth neutral.

Example No. 3. If, under the program described in Example No. 1, the State establishes for some local educational agencies a guarantee level which is less or more than $1,000 because of prior expenditure levels and still requires all local educational agencies to contribute the yield of a 10 mill property tax to the program, only the amounts up to the least amount received by any local educational agency is wealth neutral.

Example No. 4. An equalization program guarantees to each local educational agency the difference between $100 per pupil per mill levied and the actual local yield per mill levied. If no local educational agency receives more or less than $100 per pupil per mill levied, then that amount per pupil in all local educational agencies is wealth neutral. If the yield per pupil per mill levied is greater than $100 for some local educational agencies and those agencies are allowed to spend those excess revenues, then those excess revenues are not wealth neutral.

Example No. 5. If, under the program described in Example No. 4, the State restricts budget, expenditure, or tax effort increases so that some local educational agencies are restricted from levying the same number of mills as other local educational agencies, then amounts above the least amount which could be received by any local educational agency under the program are not wealth neutral.

Example No. 6. If, under the program described in Example No. 4, the State establishes for some local educational agencies a guarantee level which is less or more than $100 per pupil per mill levied because of prior expenditure levels, only the amounts up to the least amount received by any local educational agency is wealth neutral.

(2) All State revenues received by a local educational agency under any other program or State aid are wealth neutral to the extent that each local educational agency receives the same dollar amount per pupil from such programs. Revenues in excess of those determined to be equally available to all local educational agencies under such program are not wealth neutral except those revenues for special cost differentials specified in paragraph (a)(3) of this section.

Example No. 1. A State distributes a payment of $100 per pupil for instructional materials to all local educational agencies. These amounts are wealth neutral.

Example No. 2. A State distributes variable per pupil payments to some or all local educational agencies for such purposes as transportation, special education, compensatory education, vocational education, geographic isolation, or for urban factors. These amounts are wealth neutral (see paragraph (a)(3) of this section).

Example No. 3. A State rebates to local educational agencies a portion of sales or income taxes collected in those local educational agencies. Amounts up to the least amount per pupil received in any local educational agency are wealth neutral.

Example No. 4. A State distributes a payment of $125 per pupil to those districts which receive no State aid under the equalization program because of high wealth. These amounts are not wealth neutral because they are earned on the basis of wealth advantage.

(3) All local educational agency tax revenues not considered under the equalization program are wealth neutral to the extent that each local educational agency receives the same amount of dollars per pupil for the same tax effort and is allowed by the State to spend as much per pupil as any other local educational agency in the State.

Example No. 1. A State allows local educational agencies to levy taxes on property (or other bases) independent of the equalization program. Amounts up to the least amount received per pupil per unit of tax effort are wealth neutral.

Example No. 2. Because of budget, expenditure, or tax effort increase limitations, some local educational agencies are restricted from levying the same number of mills as other local educational agencies. Amounts above the least amount which could be received by any local educational agency are not wealth neutral.

(4) All local educational agency non-tax revenues which are not considered under the equalization program are wealth neutral to the extent that each local educational agency receives and is allowed to spend the same amount of dollars per pupil of such revenues.

Example No. 1. A State allows local educational agencies to earn and spend certain non-tax revenues such as interest earnings on deposits. Amounts up to the least amount per pupil received of such revenues by any local educational agency are wealth neutral.

Example No. 2. Because of budget or expenditure increase limitations, some local educational agencies are restricted from spending the same amount of dollars per pupil as other local educational agencies. Amounts up to the least amount per pupil which could be spent by any local educational agency are wealth neutral.

(d) The percent of wealth neutral revenues in a State program will be determined by:

(1) Calculating the total wealth neutral revenues for all local educational agencies in the State;

(2) Dividing the total of wealth neutral revenues by the total of all State, intermediate, and local revenues; and

(3) Multiplying by 100.

(e) In cases where per pupil amounts are necessary for calculations, those amounts will be calculated using whatever standard measurement of pupil count or other unit of need used in the State aid calculations.

(f) Further examples illustrating the use of the criteria for determining wealth neutral revenues are contained in the appendix.

(Authority: 20 U.S.C. 240(d)(2)); S. Rep. No. 763, 93d Cong., 2d Sess. (1974); H.R. Rep. No. 805, 93d Cong., 2d Sess. (1974); Congressional Research Service, *Public Law 874 and State Equalization Plans* (H.R. Comm. Print (1974))

[42 FR 65524, Dec. 30, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980]

§ 222.65 Consideration for exceptional circumstances.

(a) *General requirements.* A State program which does not conform to the standards of either § 222.63 or § 222.64 of this subpart may, nevertheless, qualify under this section if the Secretary determines on the basis of information submitted by the State, that:

(1) A decision not to apply the exact disparity standard specified in § 222.63 to the program submitted by the State would be justifiable because of exceptional circumstances within the State related to disparities in current expenditures or revenue per pupil for education;

(2) A decision not to apply the wealth neutrality standard in § 222.64 would be justifiable because of exceptional circumstances related to the coverage of educational expenditures by the State equalization program;

(3) Current expenditures or revenues for education in that State will be more equalized if payments under the Act are taken into consideration under this subpart than if they are not; and

(4) The program meets the requirements of paragraph (c) of this section.

(b) *Determination of "more equalized."* For purposes of paragraph (a)(3) of this section, current expenditures or revenues for education within a State are considered "more equalized" if the distribution around the mean per pupil expenditure for all local educational agencies within the State is less when payments under the Act are taken into consideration than when they are not, as calculated according to accepted statistical methods appropriate to the circumstances.

(c) *Specific program requirements.* A program of State aid considered under this section is not considered a program designed to equalize expenditures among local educational agencies in the State unless the Secretary finds that, in addition to meeting the requirements of the preceding paragraphs:

(1) The amount of the revenue available to local educational agencies in the State is not predominantly a function of the wealth of individual local educational agencies;

(2) The program is designed to ensure the provision of financially adequate educational programs and supportive services for every pupil in the State who is enrolled in public schools;

(3) In the determination of the relative financial need of local educational agencies, that program (i) makes provision for identifying those pupils with special educational needs (such as handicapped children, economically disadvantaged children, children with limited English-speaking ability), (ii) takes into consideration the additional costs of providing free public education for such children or categories of children; and (iii) takes into consideration the costs of providing education which might be associated with such factors as sparsity or density of population, cost of living, and socio-economic characteristics of the local educational agencies; except that nothing in this clause shall be construed to require any particular system of weighting of pupils.

(4) The program involves a substantial percentage of school revenues;

(5) The program is designed to provide systems and procedures for evaluating the degree to which the program is achieving its stated objectives.

(Authority: 20 U.S.C. 240(d)(2); S. Rep. No. 763, 93d Cong., 2d Sess. 56 (1974); H.R. Rep. No. 805, 93d Cong., 2d Sess. 42-44 (1974); 102 Cong. Rec. S 8604-8607 (daily ed., May 20, 1974); *Id.*, H 7401 (daily ed., July 31, 1974); Congressional Research Service, *Public Law 874 and State Equalization Plans* 30-34 (H.R. Comm. on Education and Labor Print (March 1974))

[42 FR 65526, Dec. 30, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980]

§ 222.66 Proportion of funds that may be taken into consideration.

(a) *Provision of law.* Section 5(d)(2)(A)(ii) of the Act provides that, in allocating State aid a State may consider as local resources funds received under the Act only in proportion to the share that local revenues covered under a State equalization program are of total local revenues. That determinations of proportionality must be made on a case-by-case, school district by school district basis, for each local educational agency affected and not on the basis of a general rule to be applied throughout a State.

(Authority: 20 U.S.C. 240(d)(2)(A)(ii); S. Rep. No. 1026, 93d Cong., 2d Sess., 163 (1974))

(b) *Computation of proportion.* (1) In computing the share that local revenues covered under a State equalization program are of total local revenues for a local educational agency with respect to a program qualifying under § 222.62, the proportion is obtained by dividing (i) the amount of local revenues covered under the equalization program by (ii) the total local revenues attributable to current expenditures for free public education within such agency.

(2) In cases where there are no local revenues for current expenditures and the State provides all of those revenues on behalf of the local educational agency, the State may consider up to 100 percent of the funds received under the Act by that agency in allocating State aid.

(Authority: 20 U.S.C. 240(d)(2)(A)(ii); 102 Cong. Rec. H. 7403 (daily ed., July 31, 1974))

(c) *Local revenues.* For the purposes of this section—

(1) "Local revenues covered under a State equalization program" means those revenues for current expenditures produced within the boundaries of a local educational agency contributed to or taken into consideration in a program of State aid subject to a determination under this subpart, but excluding all revenues from State and Federal sources.

(2) "Total local revenues" means all revenues for current expenditures of a local educational agency, including revenues for education programs for children needing special services, vocational education, transportation, and the like during the period in question but excluding all revenues from State and Federal sources.

(3) Revenues received by a local educational agency which are produced within the boundaries of an intermediate school district or other local governmental instrumentality will be counted as local revenues.

(d) *Application of proportion to payments under the Act.* The proportion established under this section (or a lesser proportion) for any local educational agency receiving payments under the Act may be applied by a State to actual receipts of those payments or to the prorated entitlements provided for under section 5 of the Act and § 222.26 of Subpart C.

(Authority: 20 U.S.C. 240(d)(2); 102 Cong. Rec. H 7412 (daily ed., July 31, 1974))

[42 FR 15546, Mar. 22, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 51 FR 6112, Feb. 20, 1986; 55 FR 17577, Apr. 25, 1990]

EFFECTIVE DATE NOTE: At 55 FR 17577, April 25, 1990, in § 222.66 paragraph (d)(2) was removed and paragraph (d)(1) was redesignated as paragraph (d), effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date. For the convenience of the user, the superseded text is set forth as follows:

§ 222.66 Proportion of funds that may be taken into consideration.

* * * * *

(d) * * *

(2) That proportion may not be applied to any portion of a payment under the Act made to a local educational agency on the basis of low-rent public housing pupils or handicapped children after July 1, 1975.

§ 222.67 Assurances in applications.

(a) *By applicants.* Each applicant for financial assistance under the Act must set forth an asssurance in its application either (1) that the State in which it is situated is not taking payments to such applicant under the Act into consideration with regard to a program of State aid, or (2) that, if the State is taking such payments into consideration with regard to its program of State aid, the State is doing so, for that applicant, in conformity with § 222.66 of this subpart.

(b) *By State educational agencies.* Each State educational agency which certifies an application for financial assistance under the Act, as provided for in § 222.10 of this part, must submit to the Secretary an assurance with such application either (1) that the State is not taking payments under the Act into consideration with regard to a program of State aid, or (2) that the State is taking such payments into consideration with regard to a program of State aid in conformity with section 5(d)(2) of the Act and this subpart.

(c) *Failure to provide assurances.* A failure on the part of any local or State educational agency to set forth the assurances required by this section constitutes sufficient cause for an initiation of proceedings by the Secretary, as provided for in § 222.68 of this subpart. However, the Secretary will not, because of a failure to provide these assurances, suspend or terminate payments under the Act with respect to such agencies prior to the rendering of a final decision under this subpart.

(Authority: 20 U.S.C. 240(d); S. Rep. No. 1026, 93d Cong., 2d Sess. 163 (1974))

[42 FR 15546, Mar. 22, 1977, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 54 FR 37257, Sept. 7, 1989]

§ 222.68 Submissions and consultations.

(a) *Initiation.* (1) A proceeding under this subpart leading to a determination by the Secretary as to whether, or the extent to which a State may take into consideration payments under the Act in determining relative finanacial resources or need under a program of State aid may be initiated (i) by the State educational agency or other appropriate agency of the State; (ii) by a local educational agency which is or would be adversely affected by that State action; or (iii) by the Secretary, if the Secretary has reason to believe that the State's action is in violation of section 5(d) of the Act and that payments to local educational agencies in the State should therefore be terminated under section 5(d) of the Act.

(2) Whenever a proceeding under this subpart is initiated, the party initiating the proceeding shall give adequate notice to all State and local agencies which might be adversely affected by a determination. Those agencies will be accorded a right of intervention in the determination proceedings.

(3) Nothing in this subpart shall be construed to prohibit a State which has not obtained a prior determination from the Secretary under this subpart from taking into consideration payments under the Act as provided for in section 5(d)(2) of the Act if that action is in conformity with §§ 222.62 and 222.66 of this subpart.

(Authority: 20 U.S.C. 240(d)(2); H.R. Rep. No. 805, 93d Cong., 2d Sess., 42-43 (1974))

(b) *Submission.* (1) A submission by a State or local educational agency under this section must be made in the manner requested by the Secretary and must contain such information and assurances as may be required by the Secretary in order to reach a determination under section 5(d) of the Act and this subpart.

(2) A State educational agency in a submission must (i) demonstrate how its program of State aid comports with the criteria and standards in § 222.62 and (ii) indicate for each local educa-

tional agency receiving funds under the Act the proportion of those funds which will be taken into consideration in accordance with § 222.66.

(3) A local educational agency in a submission must demonstrate how it is affected by (i) the action of the State and (ii) the applicability of the standards set forth in this subpart to such action.

(4) Whenever a proceeding is initiated under this subpart, the Secretary may request from a State the data deemed necessary to make a determination. A failure on the part of a State to comply with that request within a reasonable period of time shall result in a summary determination by the Secretary that the program of State aid of that State does not comport with the regulations under this subpart.

(c) *Advance consultation.* States may upon request consult with the Department regarding the possible application of the requirements of this subpart to relevant proposed legislation (such as legislation providing for taking into account funds under the Act in determining the amount of State aid) prior to the adoption of the legislation.

(Authority: 20 U.S.C. 240(d))

§ 222.69 Notice and opportunity for hearing.

(a) *General requirements.* The Secretary will afford reasonable notice of a determination under this subpart and opportunity for a hearing to any State educational agency or local educational agency adversely affected by the determination. The Secretary will afford the notice and opportunity for a hearing and the hearing (if requested) shall take place prior to the implementation by the Secretary of any determination. The notice shall set forth the reasons for the determination in sufficient detail to enable the agencies to respond.

(b) *Requests for hearing.* (1) A State or local educational agency which is adversely affected by a determination under section 5(d) of the Act and this subpart and which desires a hearing regarding that determination must submit a written request for a hearing within 30 days after the Secretary gives appropriate notice. The time within which a request must be filed will not be extended unless the time for filing the request is extended in writing by the Secretary or the Secretary's designee at the time notice of the determination is given.

(2) A request for a hearing in accordance with this section must specify the issues of fact and law to be considered.

(3) If a local educational agency requests a hearing it must furnish a copy of the request to the appropriate State educational agency. If a State requests a hearing, it must furnish a copy of the request to all local educational agencies whose payments under the Act are or would be taken into consideration in the allocation of State aid.

(c) *Time and place of hearing.* The hearing shall be held at a time and place fixed by the Secretary or the Secretary's designee (with due regard to the mutual convenience of the parties).

(d) *Counsel.* In all proceedings under this section, all parties shall have the right to be represented by counsel.

(e) *Proceedings.* The Secretary may refer the matter in controversy to a hearing officer or to a hearing panel designated by the Secretary for such purpose. The hearing officer or hearing panel may consist of or include persons who are employees of the Department, employees of other Federal departments and agencies, and persons who are not Federal employees.

(f) *Procedural rules.* (1) If in the opinion of the hearing officer or panel no dispute exists as to a material fact the resolution of which would be materially assisted by oral testimony, the hearing officer or panel shall afford each party to the proceeding an opportunity for presenting its case at the option of the hearing officer or panel (i) in whole or in part in writing or (ii) in an informal conference which shall afford each party sufficient notice of the issues to be considered (where such notice has not previously been afforded).

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the hearing officer or panel shall afford each

party, in addition to the notice of issues required by paragraph (f)(1)(ii) of this section, the following:

(i) An opportunity for a record of the proceedings;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(g) *Decisions.* When a hearing officer or panel is designated to consider the matter, the officer or panel shall make an initial decision based upon written findings, which shall be forwarded to the Secretary. The Secretary may, by appropriate notification to the parties, determine to review it or certify it as the final decision of the Secretary without further proceedings. Written notice of the initial decision shall be sent to all parties. In any case in which the Secretary modifies or reverses the initial decision, a notice of that action shall be accompanied by a written statement of the grounds for the reversal or modification. Notice of the final decision of the Secretary shall be served upon all parties to the hearing, the hearing panel and any local educational agency which may be adversely affected thereby.

(h) *Effect on payments.* (1) When an appropriate request for a hearing under this section has been made the Secretary will not suspend or terminate payments to a local educational agency under the Act on the basis of section 5(d)(1) of the Act until a final decision with respect to the matter in controversy has been made under this subpart.

(2) If a State has been finally determined, after notice and opportunity for hearing, to have been taking into consideration payments under the Act in violation of sections 5(d) (1) and (2) of the Act, the Secretary shall terminate payments under the Act to all local educational agencies in that State unless the State provides satisfactory assurances within thirty (30) days after receiving notice of a final decision, that it will restore to all affected local agencies any State aid which was denied the agencies because of those payments.

(3) If a State has been finally determined, after notice and opportunity for a hearing, to have been taking into consideration payments under the Act in excess of the proportion computed under § 222.66 of this subpart, the Secretary shall terminate payments under the Act to all local educational agencies in that State, unless the State provides satisfactory assurances, within thirty (30) days after receiving notice of a final decision, that it will reimburse all affected local educational agencies for the excess amount of payments taken into consideration in the allocation of State aid and that thereafter it will only take into consideration payments under the Act in the proportion permitted.

(4) During the thirty days provided under paragraphs (h) (2) and (3) of this section, for a State to provide satisfactory assurances, the Secretary will suspend payments under the Act to all local educational agencies in the State. However, if during that time the State does provide the assurances required, the Secretary will lift the suspension of payments.

(Authority: 20 U.S.C. 240(d), 242(b); S. Rep. No. 1026, 93d Cong., 2d Sess. 163 (1974))

Subpart H—Provisions Related to Handicapped Children and Children With Specific Learning Disabilities

SOURCE: 54 FR 37257, Sept. 7, 1989, unless otherwise noted.

§ 222.70 What are the scope and purpose of these regulations?

(a) The regulations in this subpart govern the provision of additional payments under section 3(d)(2)(C) of the Act to local educational agencies (LEAs) that provide free appropriate public education to federally connected, handicapped children who are counted under section 3(d)(2)(C) of the Act. See § 222.77 for other statutes and regulations that may be relevant.

(b) These regulations set forth the requirements, interpretations, and guidance necessary to implement section 3(d)(2)(C).

(Authority: 20 U.S.C. 238(d)(2)(C), 242(b))

§ 222.71 What definitions apply to this subpart?

In addition to the terms defined in § 222.3, the following definitions, which are generally the same as the definitions used in the Education of the Handicapped Act (20 U.S.C. 1401 *et seq.*) and in 34 CFR part 300, apply to this subpart:

Free appropriate public education means special education and related services that—

(1) Are provided at public expense, without charge, and, except for services provided to children placed in or referred to private schools or facilities by their LEAs in accordance with § 222.76, under public supervision and direction;

(2) Meet the Standards of the State educational agency (SEA), including the requirements of this part;

(3) Include preschool, elementary school, or secondary school education in the State involved; and

(4) Are provided in confirmity with an individualized education program that meets the requirements under 34 CFR 300.340–300.349.

Handicapped children is defined in 34 CFR 300.5.

Preschool program means an educational or related program encompassing the educational level from a child's birth to the time at which elementary education is provided as determined under State law, provided that this program is recognized as free public education under State law.

Related needs means those needs related to a handicap or specific learning disability for which related services, in addition to direct instructional services, are deemed necessary so that the child may effectively participate in the instructional program of the LEA.

Related services means transportation and such developmental, corrective, and supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, counseling services, and medical services for diagnostic and evaluation purposes only) required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children. (See 34 CFR 300.13 for additional information.)

(Authority: 20 U.S.C. 238(d)(2)(C), 244(10); H. Rept. 1137, 95th Cong., Sess. 2d 104-105 (1978))

§ 222.72 What requirements must an LEA meet in order to count a handicapped child for purposes of section 3(d)(2)(C)?

(a) In order that a handicapped child may be counted for the purpose of an additional payment under section 3(d)(2)(C), a child must—

(1) Have a parent on active duty in the uniformed services, as defined in § 222.3, or reside on Indian lands, as described in section 403(1)(A) of the Act;

(2) Be receiving services suited to the child's special educational and related needs; and

(3) Be enrolled in a program (including a preschool program if appropriate) that is of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the child's special educational and related needs and is provided as part of free public education in the LEA.

(b) An LEA shall—

(1) State in its application the number of federally connected, handicapped children it claims for an increased payment under section 3(d)(2)(C); and

(2) Meet the regular eligibility requirements of section 3(c) of the Act in order to receive an additional payment under section 3(d)(2)(C). (There is no minimum number of federally connected, handicapped children who must be served in order for the LEA to receive the additional payment under section 3(d)(2)(C).)

(c) An LEA shall provide the assurances and certifications required under § 222.73.

(d) An LEA shall have in effect a written individualized educational program for each federally connected, handicapped child claimed for an increased payment under section 3(d)(2)(C). An LEA that satisfies the requirements of 34 CFR 300.340-300.346 for children counted under section 3(d)(2)(C) has satisfied the requirements of this paragraph.

(c) The program provided for the handicapped children counted under section 3(d)(2)(C) must conform to State standards for programs for handicapped children and must encompass the specific educational and related needs of the children counted.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238 (a), (b), and (d)(2)(C), 240(f), 242; S. Rept. 1026, 93d Cong., 2d Sess. 159 (1974); *Chinle Common School District v. Mathews*, Civil No. 76-1273 (D.D.C. 1976))

[54 FR 37257, September 7, 1989, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.73 What assurances and certifications regarding handicapped children must an LEA provide in its application?

(a) *Size, scope, and quality of programs.* (1) An LEA shall provide an assurance that federally connected, handicapped children claimed for an increased payment under section 3(d)(2)(C) are receiving services in programs (including preschool programs) that are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational and related needs of these children. The Secretary considers any special education program serving the special educational needs of these children that conforms to the requirements for special education programs under part B of the Education of the Handicapped Act as satisfying this assurance.

(2) The LEA shall also certify that its programs conform to State standards for programs for the types of children served.

(b) *Education of the Handicapped Act requirements.* (1) An LEA shall provide an assurance that its programs conform to the policies, procedures, and requirements of sections 612 and 613 of the Education of the Handicapped Act.

(2) The Secretary may consult with persons in charge of special education programs for handicapped children and children with specific learning disabilities in the SEA to determine whether State standards and programs conform to the policies and procedures required under sections 612 and 613 of the Education of the Handicapped Act.

(c) *Additional information.* The Secretary may require information in addition to that contained in the application in order to substantiate compliance with these assurances.

(Authority: 20 U.S.C. 238(d)(2)(C); H. Rept. 805, 93d Cong., 2d Sess. 43-46 (1974); S. Rept. 1026, 93d Cong., 2d Sess. 45 (1974); Cong. Record, daily ed., H7396, July 31, 1974)

§ 222.74 What restrictions and requirements apply to the use of the additional payments under section 3(d)(2)(C)?

(a) *General.* The additional payment to an LEA that is related to the increase in entitlement under section 3(d)(2)(C) (hereinafter "section 3(d)(2)(C) funds") must be used for programs and projects designed to meet the special educational and related needs of the handicapped children counted under that section.

(Authority: 20 U.S.C. 240(f))

(b) *Methods of obligation and expenditure of funds.* Obligations and expenditures of section 3(d)(2)(C) funds may be incurred in either of two ways:

(1) An LEA may obligate or expend the section 3(d)(2)(C) funds for the fiscal year for which the funds were appropriated.

(2) An LEA may reimburse itself for obligations or expenditures of local and general State aid funds already made for the fiscal year for which the section 3(d)(2)(C) funds were appropriated.

(Authority: 20 U.S.C. 238(d)(2)(C), 240(f), 242(b))

(c) *Allowable expenditures.* An LEA shall use its section 3(d)(2)(C) funds for the following types of expenditures:

(1) Expenditures that are reasonably related to the conduct of programs or projects for the education of handicapped children. These expenditures may include program planning and evaluation but may not include the construction of school facilities.

(2) Acquisition cost (net invoice price) of equipment to meet the spe-

cial educational and related needs of handicapped children. If section 3(d)(2)(C) funds are used for the acquisition of equipment and any financial advantage is realized through rebates, discounts, bonuses, free pieces of equipment not used in a program or project for the education of handicapped children, or other circumstances, the fair market value of that financial advantage is not an allowable expenditure and may not be credited as an expenditure of those funds. In no case may the section 3(d)(2)(C) funds be used to acquire equipment if the title to that equipment would be in a private school and not in the applicant agency.

(d) *Fiscal accountability requirements.* An LEA shall account for the use of the section 3(d)(2)(C) funds as follows:

(1) By recording, for each fiscal year, the receipt (or credit) of section 3(d)(2)(C) funds separately from other funds received under the Act, *i.e.*, on a line item basis in the general fund account or in a separate account.

(2) By demonstrating that, for each fiscal year, the total amount of expenditures for programs or projects serving federally connected, handicapped children is at least equal to the amount of section 3(d)(2)(C) funds received or credited for that fiscal year. This is done as follows:

(i) For each fiscal year, the amount of an LEA's total expenditures for programs or projects serving handicapped children is determined.

(ii) The amount determined in paragraph (d)(2)(i) of this section is divided by the ADA of the total number of handicapped children the LEA served during that fiscal year.

(iii) The amount determined in paragraph (d)(2)(ii) of this section is then multiplied by the total ADA of the LEA's federally connected, handicapped children claimed by the LEA for that fiscal year.

(3) If the amount of section 3(d)(2)(C) funds the LEA received (or was credited) for the fiscal year exceeds the amount obtained in paragraph (d)(2)(iii) of this section, an overpayment equal to the excess section 3(d)(2)(C) funds is established. This overpayment may be reduced or eliminated to the extent that the LEA chooses to and can demonstrate that the average per pupil costs for serving federally connected, handicapped children exceeded its average per pupil costs for serving non-federally connected, handicapped children.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238(d)(2)(C), 240(f), 242(b); H. Rept. No. 805, 93d Cong., 2d Sess. 45 (1974))

[54 FR 37257, September 7, 1989, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.75 How does section 3(d)(2)(C) relate to State aid programs?

Section 3(d)(2)(C) funds may not supplant any State funds that were or would have been available to the LEA for the free public education of children counted under section 3(d)(2)(C).

(a) No section 3(d)(2)(C) funds may be paid to an LEA whose per pupil State aid for federally connected, handicapped children, either general State aid or special education State aid, has been or would be reduced as a result of eligibility for or receipt of section 3(d)(2)(C) funds, whether or not a State has a program of State aid that meets the requirements of section 5(d)(2) of the Act and subpart G of this part.

(1) A reduction in the per pupil amount of State aid for handicapped children, including children counted under section 3(d)(2)(C), from that received in a previous year raises a presumption that supplanting has occurred.

(2) The LEA may rebut this presumption by demonstrating that the reduction was unrelated to the receipt of section 3(d)(2)(C) funds.

(b) In any State in which there is only one LEA, all funds for handicapped programs other than funds from Federal sources are considered by the Secretary to be local funds.

(Authority: 20 U.S.C. 238(d)(2)(C), 240 (d) and (f), 242(b))

§ 222.76 When may an LEA count children in private schools or residential programs for the purposes of section 3(d)(2)(C)?

(a) An LEA must have placed a handicapped child in, or referred a handicapped child to, a private school or facility under the policies and procedures required by section 613 of the Education of the Handicapped Act in order to count that child under section 3(d)(2)(C). Regulations implementing those policies and procedures are set forth in 34 CFR part 300, subpart D.

(Authority: 20 U.S.C. 244(10), 1413(a)(4)(B))

(b) If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the LEA may count that child under section 3(d)(2)(C). Regulations describing these placements are set forth in 34 CFR part 300, subpart C.

(Authority: 20 U.S.C. 244(10), 1401 (9), (10), and (18), 1413(a)(4)(B))

(c) Children who have been placed in private schools by their parents may not be counted under section 3(d)(2)(C) but may participate in public school programs that use section 3(d)(2)(C) funds.

(Authority: 20 U.S.C. 238(d)(2)(C), 240(f); H. Rept. 805, 93d Cong., 2d Sess. 45 (1974))

§ 222.77 What other statutory and regulatory requirements are relevant to section 3(d)(2)(C)?

(a) *Applicability of the Education of the Handicapped Act and related regulations.* LEAs receiving section 3(d)(2)(C) funds are generally subject to the requirements of the Education of the Handicapped Act, as amended, and related regulations (20 U.S.C. 1401 *et seq.* and 34 CFR part 300).

(b) *Applicability of general provisions regulations.* Relevant provisions contained in 34 CFR parts 75, 77, and 80 are applicable to programs conducted with section 3(d)(2)(C) funds.

(Authority: 20 U.S.C. 242(b))

Subpart I—Standards for Determining Eligibility Under Section 3 of the Act

SOURCE: 51 FR 41562, Nov. 17, 1986, unless otherwise noted.

§ 222.80 Payments to local educational agencies.

The Secretary makes payments to an applicant local educational agency (LEA) for children claimed under section 3 of the Act, only if:

(a) The LEA is responsible under applicable State or Federal law for providing a free public education (as provided in § 222.81) to those children;

(b) The LEA is providing a free public education to those children; and

(c) The State provides funds for the education of those children on the same basis as all other public school children in the State, unless permitted otherwise under section 5(d)(2) of the Act.

(Authority: 20 U.S.C. 238 (a) and (b))

§ 222.81 Free public education.

(a) As used in § 222.80, a free public education means education that is provided:

(1) At public expense;

(2) As the complete elementary or secondary educational program;

(3) In a school of the LEA or under a tuition arrangement with another LEA or other educational entity; and

(4) Under public supervision and direction, except with respect to—

(i) Handicapped children; and

(ii) Children who are attending schools funded under section 1128 of Public Law 95-561 (the Indian School Equalization Program operated by the Bureau of Indian Affairs, Department of the Interior) but who are not eligible for funding under that section.

(b) For the purpose of paragraph (a)(1) of this section, education is provided at public expense if:

(1) There is no tuition charge to the child or the child's parents; and

(2) Federal funds, other than Impact Aid funds, do not provide a substantial portion of the educational program.

(c) For the purpose of paragraph (a)(2) of this section, the complete elementary or secondary educational program is the program recognized by the State as meeting all requirements for elementary or secondary education for the children claimed and does not include a program that provides only:

(1) Supplementary services or instruction; or

(2) A portion of the required educational program.

(d) For the purpose of paragraph (a)(3) of this section, a tuition arrangement must:

(1) Satisfy all applicable legal requirements in the State; and

(2) Genuinely reflect the applicant LEA's responsibility to provide a free public education to the children claimed under section 3.

(e) For the purpose of paragraph (a)(4) of this section, education provided under public supervision and direction means education that is provided:

(1) In a school of the applicant LEA or another LEA; or

(2) By another educational entity, over which the applicant LEA, or other public agency, exercises authority with respect to the significant aspects of the educational program for the children claimed. The Secretary considers significant aspects of the educational program to include administrative decisions relating to teachers, instruction, and curriculum.

(Authority: 20 U.S.C. 238(d)(2)(D), 244(4))

[51 FR 41562, Nov. 17, 1986, as amended at 54 FR 37259, Sept. 7, 1989]

Subpart J—Provisions for Section 2

SOURCE: 53 FR 5555, Feb. 24, 1988, unless otherwise noted.

§ 222.90 What are the scope and purpose of these regulations?

The regulations in this subpart implement section 2 of the Act only (hereinafter "section 2"). The program authorized by section 2 provides financial assistance, under certain circumstances, to a local educational agency (LEA) that is financially burdened by the Federal acquisition, after 1938, of real property in the school district.

(Authority: 20 U.S.C. 236, 237)

§ 222.91 What definitions apply to this subpart?

Many of the general definitions contained in § 222.3 apply to this subpart. In addition, the following definitions apply only to this subpart:

"Acquisition" or "acquired by the United States."

(1) The term means:

(i) The receipt or taking by the United States of ownership in fee simple of real property by condemnation, exchange, gift, purchase, transfer, or other arrangement;

(ii) The receipt by the United States of real property as trustee for the benefit of individual Indians or Indian tribes; or

(iii) The imposition by the United States of restrictions on sale, transfer, or exchange of real property held by individual Indians or Indian tribes.

(2) The definitions of "acquisition" in 34 CFR 74.132 (Administration of [ED] grants) and 77.1(c) (Definitions that Apply to Department Regulations) of this title do not apply to this subpart.

(Authority: 20 U.S.C. 237(a), 244(1))

"Assessed value."

(1) The term means the value that is assigned to real property, for the purpose of generating local real property tax revenues for elementary and secondary education current expenditure ("school") purposes, by a State or local official who is legally authorized to determine that assessed value.

(2) "Assessed value" does not include:

(i) A value assigned to tax-exempt real property;

(ii) A value assigned to real property for the purpose of generating other types of revenues, such as payments in lieu of taxes (PILOTs);

(iii) Fair market value, or a percentage of fair market value, of real property unless that value was actually used to generate local real property tax revenues for school purposes; or

(iv) A value assigned to real property in a condemnation or other court proceeding, or a percentage of that value, unless that value was actually used to generate local real property tax revenues for school purposes.

(Authority: 20 U.S.C. 237(a))

§ 222.92 What financial data are used to determine eligibility and entitlement under section 2?

The Secretary uses final financial data from an LEA's current fiscal year to determine final section 2 eligibility (§§ 222.93-222.96 and § 222.102(b)) and entitlement (§§ 222.97-222.101, and § 222.102(c)).

(Authority: 20 U.S.C. 237)

§ 222.93 Who is eligible for section 2 assistance?

An LEA is eligible for financial assistance under section 2 if the Secretary determines that the LEA meets the requirements of §§ 222.94, 222.95, and 222.96.

(Authority: 20 U.S.C. 237(a) (1), (2), and (3))

§ 222.94 What criteria must be met regarding Federal acquisition of real property in a school district?

(a) For an LEA to be eligible to receive financial assistance under section 2, the United States must own or acquire Federal property, within the school district of the LEA, that meets each of the following criteria:

(1) The United States has acquired the Federal property since 1938.

(2) The Federal property was not acquired by exchange for other Federal property that the United States owned within the school district before 1939.

(3) The Federal property that meets the criteria in paragraphs (a) (1) and (2) of this section has an aggregate assessed value of 10 percent or more of the assessed value of all real property in the school district, based upon the assessed values of the Federal property and of all real property (including that Federal property) on the date or dates of acquisition of the Federal property.

(b) If, during any fiscal year, the United States sells, transfers, is otherwise divested of ownership of, or relinquishes an interest in or restriction on, Federal property upon which an LEA's eligibility is based, the Secretary redetermines the LEA's eligibility for the following fiscal year, based upon the remaining Federal property, in accordance with paragraph (a) of this section.

(c)(1) The Secretary bases the determination of eligibility under paragraph (a) of this section, for a new section 2 applicant or for newly acquired Federal property, only upon:

(i) Original records as of the time(s) of Federal acquisition of real property, prepared by a legally authorized official, documenting the assessed value of that real property; or

(ii) Facsimiles of those records such as microfilm or other reproduced copies.

(2) The Secretary bases the redetermination of an LEA's eligibility under paragraph (b) of this section only upon:

(i) Records described in paragraph (c)(1) of this section; or

(ii) Department records.

(3) The Secretary does not base the determination of an LEA's eligibility under this section upon secondary documentation such as estimates, certifications, or appraisals.

(Authority: 20 U.S.C. 237(a)(1))

§ 222.95 What constitutes a substantial and continuing financial burden?

(a) An LEA is eligible to receive section 2 assistance only if Federal acquisition of property meeting the criteria in § 222.94 places a substantial and continuing financial burden on the LEA.

(b) The Secretary determines whether a substantial and continuing financial burden exists by subtracting from the LEA's total current expenditures all local, State, and Federal revenues—except local real property tax revenue and section 2 payments—available to the LEA for current expenditures during the fiscal year of the LEA for which the LEA is applying for assistance. The resulting figure is the amount of current expenditures for which the LEA needs local revenue. For the purpose of this paragraph:

(1) All Federal assistance received by the LEA for maintenance and operations, except assistance received for the purpose of Chapter 1 of the Education Consolidation and Improvement Act of 1981 (ECIA) (20 U.S.C. 3801-3808, 3871-3876), is included as

revenue available to the LEA for current expenditures; and

(2) Any carryover (opening) balance on the first day of an LEA's fiscal year, that is equal to or less than the carryover amount allowed by the State without a reduction in the LEA's State aid, is not considered revenue available to the LEA for current expenditures.

(c) The Secretary determines that a substantial and continuing burden exists if the amount obtained in paragraph (b) of this section is greater than zero.

(d) The Secretary determines that a substantial and continuing burden does not exist if the amount obtained in paragraph (b) of this section is zero or less.

(Authority: 20 U.S.C. 237(a)(2).)

[53 FR 5555, Feb. 25, 1988, as amended at 54 FR 6859, Feb. 14, 1989]

§ 222.96 When is an LEA not substantially compensated from Federal activity?

An LEA is eligible to receive section 2 assistance only if the LEA is not being substantially compensated, by increases in local revenue from Federal activities with respect to real property in the school district meeting the criteria of § 222.94(a) (1) and (2), for the loss of local revenue resulting from Federal acquisition of real property. The Secretary considers that an LEA is being substantially compensated by increases in local revenue from the carrying on of Federal activities with respect to that Federal property if:

(a) The LEA receives new or increased local revenue that is generated directly from the Federal property or activities in or on that property; and

(b) The local revenue described in paragraph (a) of this section equals or exceeds the amount obtained in § 222.101(b) (the Federal share of the amount of local revenue needed by the LEA for its current expenditures).

(Authority: 20 U.S.C. 237(a)(3))

§ 222.97 What financial assistance is an LEA entitled to under section 2?

Except as otherwise limited by law or the amount of appropriated funds, an LEA that meets the requirements of § 222.93 is entitled to financial assistance under section 2 in an amount equal to the lesser of:

(a) The amount determined under § 222.98 (maximum entitlement); or

(b) The amount determined under § 222.101 (need-based entitlement).

(Authority: 20 U.S.C. 237(a))

§ 222.98 How is an LEA's section 2 maximum entitlement determined?

An LEA's section 2 maximum entitlement is the amount of local revenue that, in the Secretary's judgment, the LEA would have derived and had available for current expenditures from the eligible Federal property if that property had remained on the tax rolls. The Secretary determines that amount as follows:

(a) In accordance with § 222.99, the Secretary first establishes an estimate of what the total assessed value of the Federal property meeting the criteria in § 222.94(a) would be if it were on the tax rolls in the fiscal year for which assistance is sought ("estimated current assessed value"), based on the classification, character, and condition of that property as it was when acquired by the United States. The Secretary does not include in this figure any estimated current assessed value for improvements or other changes made in or on the Federal property after the Federal acquisition.

(b) The Secretary then computes the LEA's section 2 maximum entitlement by multiplying the total estimated current assessed value referred to in paragraph (a) of this section by—

(1) For fiscally independent LEAs, the current local real property tax rate for school purposes levied by the LEA; and

(2) For fiscally dependent LEAs, the current local real property tax rate for school purposes imputed for the LEA in accordance with paragraph (1)(ii) of the definition of "Local real property tax rate for school (elementary and secondary education current expenditure) purposes" in § 222.3.

(Authority: 20 U.S.C. 237(a))

[53 FR 5555, Feb. 24, 1988, as amended at 53 FR 39020, Oct. 4, 1988]

§ 222.99 How is an estimated current assessed value established for Federal property?

(a) The following definitions apply to this section:

Character means the nature of the land, whether and to what extent the land has improvements, and how the land and any improvements are being used.

Classification means tax classification or category.

Condition means the quality of the land and the physical state of any improvements.

(b) The Secretary establishes an estimated current assessed value for Federal property as follows:

(1) The Secretary determines whether there is taxed real property within the same assessment district as the Federal property that is currently comparable to the Federal property as it was when acquired by the United States. In making this determination, the Secretary:

(i) Considers as comparable, and selects, taxed real property within the same assessment district as the Federal property that currently is substantially similar in classification, character, and condition to the Federal property as it was when acquired by the United States; and

(ii) Does not consider all taxed real property within an assessment district or assessment classification as comparable unless every parcel of that taxed real property currently is substantially similar in classification, character, and condition to the Federal property as it was when acquired by the United States.

(2) If the Secretary determines that there is comparable taxed real property within the same assessment district as the Federal property, the Secretary establishes an estimated current assessed value for the Federal property by:

(i) Selecting a number of parcels of that comparable property;

(ii) Computing the average current assessed value per assessment unit of measure (*e.g.*, acre, square foot, linear foot, ect.) for the selected comparable property by dividing the total current assessed value of the parcels by the total number of units in those parcels; and

(iii) Multiplying the average current assessed value per unit for the selected comparable property computed in paragraph (b)(2)(ii) of this section by the number of those units in the Federal property.

(3) Subject to paragraph (b)(4) of this section, if the Secretary determines that there is no comparable taxed real property within the same assessment district as the Federal property, the Secretary establishes an estimated current assessed value for the Federal property as follows:

(i) The Secretary selects a number of parcels of taxed real property within the same assessment district as the Federal property that currently are the next most similar in classification, character, and condition to the Federal property as it was when acquired by the United States.

(ii)(A) If the selected property differs from the Federal property as it was when acquired, in that there are improvements on the selected property but there were none on the Federal property when it was acquired, and the selected property is assessed separately for land and improvements, the Secretary uses the assessed value for the land of the selected property in establishing the estimated current assessed value of the Federal property.

(B) If the selected property differs from the Federal property as it was when acquired in that the selected property is of a higher or lower tax classification (*i.e.*, a tax classification that represents a greater or lesser degree of development, respectively) than that of the Federal property, the Secretary maintains the ratio that existed at the time of Federal acquisition between the average assessed value of real property in the same tax classification as the Federal property and the average assessed value of all real property in the same tax classification as the selected property.

(4) If the Secretary determines that the methods described in paragraph (b)(3) of this section are not applicable, the Secretary uses any such other method as the Secretary determines will reasonably accomplish the objective described in § 222.98(a).

(Authority: 20 U.S.C. 237(a))

[53 FR 5555, Feb. 24, 1988, as amended at 54 FR 30040, July 18, 1989]

§ 222.101 How is an LEA's section 2 need-based entitlement determined?

The Secretary determines an LEA's need-based entitlement by computing the Federal share of the amount of local revenue needed by the LEA for its actual current expenditures. The Secretary computes this amount as follows:

(a) The Secretary divides the total estimated current assessed value (determined in accordance with § 222.99(b)) of Federal property meeting the criteria in § 222.94(a) by the sum of that estimated current assessed value and the actual current assessed value of all other real property within the school district of the applicant. The resulting figure is the approximate proportion of the LEA's local real property tax base that is comprised of Federal property.

(b) The Secretary then multiplies the figure obtained in paragraph (a) of this section by the amount obtained in § 222.95(b) (the amount of current expenditures for which the LEA needs local revenue).

(Authority: 20 U.S.C. 237(a))

§ 222.102 How are section 2 eligibility and entitlement determined for an LEA formed by consolidation of school districts?

(a) *General.* An LEA formed after 1938 by consolidation of two or more former school districts may elect to have the Secretary determine its section 2 eligibility and entitlement upon either of the following bases:

(1) One or more of the former school districts that meet the criteria in paragraph (b)(1) of this section.

(2) The consolidated district as a whole.

(b) *Eligibility.* An LEA described in paragraph (a) of this section is eligible to receive section 2 assistance on the basis of a former school district if:

(1) The former school district upon which eligibility is based:

(i) At the time of consolidation contained some Federal property meeting the criteria in § 222.94(a)(1) (acquired by the United States since 1938) and § 222.94(a)(2) (not acquired by exchange for other Federal property that the United States owned within the school district before 1939); and

(ii) For the year of application, contains within its former boundaries Federal property meeting the criteria in § 222.94(a) (1) and (2), that has an aggregate assessed value of 10 percent or more of the assessed value of all real property (including the Federal property) in the former school district, based upon the assessed values of the Federal property and of all real property (including the Federal property) on the date or dates of acquisition of the Federal property; and

(2) The LEA meets the criteria in §§ 222.95 and 222.96.

(c) *Entitlement.* Except as otherwise limited by law or the amount of appropriated funds, an LEA that meets the eligibility criteria in paragraph (b) of this section is entitled to financial assistance under section 2 in an amount equal to the lessor of the maximum entitlement or the need-based entitlement, which are determined as follows:

(1) The Secretary determines maximum entitlement in accordance with § 222.98, except that the estimated current assessed value for Federal property upon which the maximum entitlement is based includes only the estimated current assessed value for the Federal property described in paragraph (b)(1)(ii) of this section.

(2) The Secretary determines need-based entitlement by:

(i) Dividing the total estimated current assessed value for the Federal property meeting the criteria in paragraph (b)(1)(ii) of this section, that is within a former school district meeting the criteria in paragraph (b)(1) of this section, by the sum of that estimated current assessed value and the actual current assessed value of all other real property within the consolidated LEA; and

(ii) Multiplying the figure obtained in paragraph (c)(2)(i) of this section by the amount obtained in § 222.95(b) (the amount of current expenditures for which the LEA needs local revenue).

(d) If an LEA elects to have its section 2 eligibility and entitlement determined on the basis of one or more former school districts, the LEA shall designate in its application the district or districts it selects.

(Authority: 20 U.S.C. 237(c))

§ 222.103 How are section 2 overpayments recovered?

(a) If a section 2 overpayment results from an error by the Department in computing or recomputing an LEA's need-based entitlement, the Secretary will—upon an LEA's request—arrange for no more than 10 percent of the original section 2 overpayment, with interest, to be repaid or deducted from current payments in any fiscal year.

(Authority: Pub. L. 98-511, sec. 302)

(b) Except as provided in paragraph (a) of this section, adjustments for and recovery of section 2 overpayments are made in accordance with § 222.42.

(Authority: 20 U.S.C. 240, 242(b), 1226a-1)

Subpart K—Provisions for Section 3(d)(2)(B)

SOURCE: 54 FR 37259, Sept. 7, 1989, unless otherwise noted.

§ 222.120 What are the scope and purpose of these regulations?

(a) The regulations in this subpart implement section 3(d)(2)(B) of the Act. Sections 222.124-222.129 also implement section 3(d)(3)(B)(ii) of the Act.

(b) The program authorized by section 3(d)(2)(B) provides financial assistance, in addition to regular payments under section 3 of the Act, to certain heavily impacted local educational agencies (LEAs) that demonstrate eligibility for that assistance.

(Authority: 20 U.S.C. 238(d)(2)(B))

§ 222.121 What financial data from LEAs are used to determine eligibility, entitlement, and payment under section 3(d)(2)(B)?

Final computations and determinations made with regard to an LEA's eligibility (§§ 222.122-222.130), maximum entitlement (§ 222.131), and payment (§ 222.132) under section 3(d)(2)(B) are based on final financial data for the LEA's current fiscal year and final financial data for the prior fiscal year of the LEAs determined under § 222.36 to be generally comparable to the applicant LEA (referred to in this part as "generally comparable LEAs").

(Authority: 20 U.S.C. 238(d)(2)(B))

§ 222.122 What LEAs are eligible for financial assistance under section 3(d)(2)(B)?

Subject to § 222.123, an LEA is eligible for financial assistance under section 3(d)(2)(B) of the Act if the LEA is eligible for a regular section 3 payment, applies for assistance under section 3(d)(2)(B), and the Secretary determines that the LEA meets all of the following requirements:

(a) As determined under § 222.130, the LEA does not have sufficient funds to enable it to provide a level of education equivalent to that provided by its generally comparable LEAs. For the purpose of this subpart, "level of education" means average per pupil expenditure amount. (See § 222.131(a).)

(b) The LEA is making a reasonable tax effort in accordance with the requirements of §§ 222.124-222.129 and exercising due diligence in availing itself of revenues derived from State and other sources.

(c) At least 50 percent of the total number of children in average daily attendance (ADA) for whom the LEA provides free public education during its current fiscal year are federally connected children.

(d) The eligibility of the LEA for State aid and the amount of State aid are determined on a basis no less favorable than that for other LEAs in the State.

(Authority: 20 U.S.C. 238(d)(2)(B))

§ 222.123 How does a State's equalization program affect an LEA's eligibility for section 3(d)(2)(B) assistance?

The Secretary determines that an LEA is not eligible for financial assistance under section 3(d)(2)(B) if—

(a) The LEA is in a State that has an equalized program of State aid that meets the requirements of section 5(d)(2) of the Act; and

(b) The State, in determining the LEA's eligibility for or amount of State aid, takes into consideration the LEA's payments under section 3(d)(2)(B).

(Authority: 20 U.S.C. 238(d)(2)(B), 240(d)(2))

§ 222.124 How does the Secretary determine whether a fiscally independent LEA is making a reasonable tax effort?

(a) To determine whether a fiscally independent LEA, as defined in § 222.3, is making a reasonable tax effort as required by § 222.122, the Secretary compares the LEA's local real property tax rates for school purposes (referred to in this part as "tax rates"), as defined in § 222.3, with the tax rates of its generally comparable LEAs.

(b) For purposes of this section, the Secretary uses—

(1) Actual tax rates if all the real property in the LEA and its generally comparable LEAs is assessed at the same percentage of true value; or

(2) Tax rates computed under §§ 222.126–222.128.

(c) The Secretary determines that an LEA is making a reasonable tax effort if—

(1) The LEA's tax rate is equal to at least 95 percent of the average tax rate of its generally comparable LEAs;

(2) Each of the LEA's tax rates for each classification of real property is equal to at least 95 percent of each of the average tax rates of its generally comparable LEAs for the same classification of property;

(3) The LEA taxes all of its real property at the maximum rates allowed by the State, if those maximum rates apply uniformly to all LEAs in the State; or

(4) The LEA has no taxable real property.

(Authority: 20 U.S.C. 238(d)(2)(B))

§ 222.125 What information must be provided by the State educational agency?

The State educational agency (SEA) of any State with an LEA applying for assistance under section 3(d)(2)(B) shall provide the Secretary with relevant information necessary to determine whether the LEA is making a reasonable tax effort under §§ 222.126–222.129, whichever is applicable.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238(d)(2)(B), 242(b))

[54 FR 37259, September 7, 1989, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.126 What tax rates does the Secretary use if real property is assessed at different percentages of true value?

If the real property of an LEA and its generally comparable LEAs consists of one classification of property but the property is assessed at different percentages of true value in the different LEAs, the Secretary determines whether the LEA is making a reasonable tax effort under § 222.124(c)(1) by using tax rates computed by—

(a) Multiplying the LEA's actual tax rate for real property by the percentage of true value assigned to that property for tax purposes; and

(b) Performing the computation in paragraph (a) of this section for each of its generally comparable LEAs and determining the average of those computed tax rates.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238(d)(2)(B))

[54 FR 37259, September 7, 1989, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.127 What tax rates does the Secretary use if two or more different classifications of real property are taxed at different rates?

If the real property of an LEA and its generally comparable LEAs consists of two or more classifications of real property taxed at different rates, the Secretary determines whether the LEA is making a reasonable tax effort under § 222.124(c) (1) or (2) by using one of the following:

(a) Actual tax rates for each of the classifications of real property.

(b) Tax rates computed in accordance with § 222.126 for each of the classifications of real property.

(c) Tax rates computed by—

(1) Determining the total true value of all real property in the LEA by dividing the assessed value of each classification of real property in the LEA by the percentage, of true value assigned to that property for tax purposes and aggregating the results;

(2) Determining the LEA's total revenues derived from local real property taxes for school purposes;

(3) Dividing the amount determined in paragraph (c)(2) of this section by the amount determined in paragraph (c)(1) of this section; and

(4) Performing the computations in paragraphs (c) (1), (2), and (3) of this section for each of the generally comparable LEAs and determining the average of their computed tax rates.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238(d)(2)(B))

[54 FR 37259, September 7, 1989, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.128 What tax rates may the Secretary use if substantial local revenues are derived from local tax sources other than real property taxes?

(a) In a State in which a substantial portion of revenues for current expenditures for educational purposes is derived from local tax sources other than real property taxes, the SEA may request that the Secretary take those revenues into account in determining whether an LEA in that State is making a reasonable tax effort under § 222.124.

(b) If, based upon the request of an SEA, the Secretary determines that it s appropriate to take the revenues described in paragraph (a) of this section nto account in determining whether n LEA in that State is making a reasonable tax effort under § 222.124, the Secretary uses tax rates computed by—

(1) Dividing the assessed value of ach classification of real property in he LEA by the percentage of true value assigned to that property for tax purposes and aggregating the results;

(2) Determining the LEA's total revenues derived from local tax sources for school purposes;

(3) Dividing the amount determined in paragraph (b)(2) of this section by the amount determined in paragraph (b)(1) of this section; and

(4) Performing the computations in paragraphs (b) (1), (2), and (3) of this section for each of the generally comparable LEAs and determining the average of those computed tax rates.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238(d)(2)(B))

[54 FR 37259, September 7, 1989, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.129 How does the Secretary determine whether a fiscally dependent LEA is making a reasonable tax effort?

(a) If an LEA is fiscally dependent, as defined in § 222.3, the Secretary compares the LEA's imputed local tax rate, calculated under paragraph (b) of this section, with the average tax rate of its generally comparable LEAs, calculated under paragraph (c) of this section, to determine whether the LEA is making a reasonable tax effort.

(b) The Secretary imputes a local tax rate for a fiscally dependent LEA by—

(1) Dividing the assessed value of each classification of real property within the boundaries of the general government by the percentage of true value assigned to that property for tax purposes and aggregating the results;

(2) Determining the amount of locally derived revenues made available by the general government for the LEA's current expenditures for school purposes; and

(3) Dividing the amount determined in paragraph (b)(2) of this section by the amount determined in paragraph (b)(1) of this section.

(c) The Secretary performs the computations in paragraph (b) of this section for each of the fiscally dependent generally comparable LEAs and the computations in §§ 222.126–222.128, whichever is applicable, for each of the fiscally independent generally comparable LEAs and determines the average of all those tax rates.

(d) The Secretary determines that a fiscally dependent LEA is making a reasonable tax effort if its imputed local tax rate is equal to at least 95 percent of the average tax rate of its generally comparable LEAs.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 238(d)(2)(B))

[54 FR 37259, September 7, 1989, as amended at 54 FR 47076, Nov. 9, 1989]

§ 222.130 How does the Secretary determine whether an LEA lacks sufficient funds to enable it to provide a level of education equivalent to that provided by its generally comparable LEAs?

(a) The Secretary determines whether an LEA lacks sufficient funds to enable it to provide a level of education equivalent to that provided by its generally comparable LEAs, in accordance with § 222.122, as follows:

(1) First, the Secretary establishes the level of education equivalent to that provided by the LEA's generally comparable LEAs by—

(i) Computing the average per pupil expenditure (APPE) of the generally comparable LEAs by dividing the sum of the total current expenditures of those LEAs for their prior fiscal year by the sum of the total ADA of those LEAs for that prior fiscal year;

(ii) Increasing or decreasing the amount obtained in paragraph (a)(1)(i) of this section by the percentage the APPE of the generally comparable LEAs increased or decreased from their second preceding fiscal year to their prior fiscal year; and

(iii) Multiplying the amount determined in paragraph (a)(1)(ii) of this section by the LEA's total ADA for its current fiscal year.

(2) The Secretary next identifies the funds available to the LEA for current expenditures for its current fiscal year by—

(i) Adding the LEA's section 3 payment for the current fiscal year and all other funds available to the LEA for current expenditures for that current fiscal year; and

(ii) Subtracting from the amount obtained in paragraph (a)(2)(i) of this section the LEA's allowable carryover amount, which is that portion of the LEA's opening cash balance for the current fiscal year that does not exceed—

(A) The maximum amount of funds for current expenditures that the LEA was allowed by State law to carry over from the prior fiscal year to the current fiscal year, provided that State restrictions on carryover amounts were applied uniformly to all LEAs in the State; or

(B) If no State law governing cash balances exists, 30 percent of the LEA's "operating costs" for the prior fiscal year.

(3) The Secretary then subtracts the amount obtained in paragraph (a)(2)(ii) of this section from the figure computed in paragraph (a)(1)(iii) of this section.

(b) The Secretary determines that an LEA lacks sufficient funds to enable it to provide a level of education equivalent to that provided by its generally comparable LEAs if the amount determined in paragraph (a)(3) of this section is greater than 0.

(c) The following definitions apply to this subpart:

All other funds available to the LEA for current expenditures means—

(1) All funds received by the LEA for current expenditures from local sources (or, in the case of a fiscally dependent LEA, all funds budgeted for or made available to the LEA, whichever is greater, by the general government) and from State and Federal sources, except any payments under section 3 or section 3(d)(2)(B) of the Act received during the current fiscal year and funds granted for the purpose of Chapter 1 or Chapter 2 of Title 1 of the Elementary and Secondary Education Act of 1965; and

(2) Funds on hand for current expenditures at the beginning of the current fiscal year ("opening cash balance").

Operating costs is given the same meaning as the term "current expenditures," which is defined in § 222.3.

Section 3 payment means the total payment based on the LEA's entitlements under sections 3(d)(1), (3)(d)(2)(C)(i), and 3(d)(2)(D) of the Act.

(Authority: 20 U.S.C. 238(d)(2)(B), (C)(i), and (D), 244(5))

§ 222.131 How does the Secretary determine an LEA's maximum entitlement under section 3(d)(2)(B)?

To determine the maximum entitlement under section 3(d)(2)(B) for an LEA that meets the requirements of § 222.122, the Secretary—

(a) Computes the average per pupil expenditure of the generally comparable LEAs in accordance with § 222.130(a)(1) (i) and (ii);

(b) Multiplies the amount determined in paragraph (a) of this section by the total ADA of the LEA's federally connected children; and

(c) Subtracts from the amount computed in paragraph (b) of this section the total amount of State aid received by the LEA for its federally connected children.

Authority: 20 U.S.C. 238(d)(2)(B))

§ 222.132 How does the Secretary determine an LEA's payment under section 3(d)(2)(B)?

(a) Except as provided in paragraph b) of this section, an LEA that meets he requirements of § 222.122 receives payment under section 3(d)(2)(B) in n amount equal to the lesser of—

(1) The amount determined in 222.130(a)(3); or

(2) The LEA's maximum entitlement etermined under § 222.131 minus the mount of the LEA's section 3 payent for the current fiscal year.

(b) In the case of an LEA whose tax ate is at least 95 percent but less than 00 percent of the average tax rate of s generally comparable LEAs, the ecretary reduces the LEA's payment nder section 3(d)(2)(B), as determined in paragraph (a) of this section, y the percentage that the average ax rate of the generally comparable EAs exceeds the tax rate of the LEA.

uthority: 20 U.S.C. 238(d)(2)(B))

APPENDIX TO PART 222

[Pub. L. 81-874, Section 5(d)]

ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITIES; METHODS OF CALCULATIONS FOR TREATMENT OF PAYMENT UNDER STATE EQUALIZATION PROGRAMS

The following paragraphs described the methods for making certain calculations in conjunction with determinations made under various requirements of the regulations set forth in this subpart. These methods shall be the only methods used in making these calculations.

1. *Determinations of disparity standard compliance under § 222.63(b)(1).*

The determination of disparity in current expenditures or revenue per pupil is made by:

(a) Ranking all local educational agencies having similar grade levels within the State on the basis of current expenditures or revenues per pupil with respect to the fiscal year for which data has been submitted in accordance with these regulations;

(b) Identifying those local agencies in each ranking which fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of these agencies; and

(c) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (b) and dividing the difference by the lower figure.

Example: In State X, after ranking all local educational agencies organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in these agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1000. The percentage disparity between the 95th and 5th local educational agencies is 22 percent ($1000 − $820 = $180 ÷ $820). The program would be deemed to qualify.

(d) In cases under § 222.63(b), where separate computations are made for different groups of local educational agencies, the disparity percentage for each group is obtained in the manner described in paragraphs (a), (b) and (c) above. Then the weighted average disparity percentage as for the State as a whole is determined by:

(i) Multiplying the disparity percentage for each group by the total number of pupils receiving free public education in the schools in that group;

(ii) Summing the figures obtained in (i); and

(iii) Dividing the sum obtained in (ii) by the total number of pupils for all the groups.

Example: For State Y three groups of local educational agencies were considered. Group No. 1 (grades 1-6) had a disparity percentage of 18 percent and 80,000 pupils. Group No. 2 (grades 7-12) had a disparity percentage of 22 percent and 100,000 pupils. Group No. 3 (grades 1-12) had a disparity percentage of 35 percent and 20,000 pupils. The figure obtained under (i) is 14,400 for group No. 1, 22,000 for group No. 2, and 7000 for group No. 3. The sum of these figures under (ii) is 43,400. Dividing that number by the total number of pupils for all three groups (200,000) gives a weighted average percentage of 21.7 percent. State Y meets the requirement of § 222.63(b).

2. *Determination under § 222.63(b) as to maximum proportion of Pub. L. 81-874 payments that may be taken into consideration by a State under an equalization program.* The proportion that local revenues covered under a State equalization program are of total local revenues for a particular local educational agency shall be obtained by dividing: (a) the amount of local revenues covered under the equalization program by (b) the total local revenues attributable to current education within the agency.

Examples.

Example 1. State A has an equalization program under which each LEA is guaranteed $900 per pupil less the LEA contribution based on a uniform tax levy. LEA X contributes $700 per pupil and the State contributes the $200 difference. No other local revenues are applied to current expenditures for education by LEA X. The percentage of funds under the Act which may be taken into consideration by State A for LEA X is 100% (700/700). If LEA X receives $100 per pupil in Pub. L. 81-874 funds, $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

Example 2. The initial facts are the same as in Example 1, except that LEA X, under a permissible additional levy outside the equalization program, raises an additional $100 per pupil. The percentage of Pub. L. 81-874 funds which may be taken into consideration is 87.5% (700/800). If LEA X receives $100 per pupil in Pub. L. 81-874 funds, $87.50 per pupil may be taken into consideration. LEA X is now regarded as contributing $787.50 per pupil under the program and State A would now contribute $112.50 per pupil as the difference.

Example 3. State B has an equalization program in which each participating LEA is guaranteed a certain per pupil revenue at various levels of tax rates. For an 8 mill rate the guarantee is $500, for 9 mills $550, for 10 mills $600. LEA Y levies a 10 mill rate and realizes $300 per pupil. Furthermore, it levies an additional 10 mills under a local leeway option, realizing another $300 per pupil. The percentage of Pub. L. 81-874 which may be taken into consideration is 50% (300/600). If LEA Y receives $100 per pupil in Pub. L. 81-874 funds, $50 per pupil may be taken into consideration. LEA Y may be regarded as contributing $350 per pupil under the program and State B would not contribute $250 as the difference.

Example 4. The initial facts are the same as in Example 3, except that LEA Z in State B, while taxing at the same 10 mill rate for both the equalization program and leeway allowance as LEA Y, realizes $550 per pupil for each tax. As with LEA Y, the percentage of Pub. L. 81-874 funds which may be taken into consideration for LEA Z is 50% (550/1100). If LEA Z receives $150 per pupil in Pub. L. 81-874 funds, then up to $75 per pupil normally could be taken into consideration. However, since LEA Z would have received only $50 per pupil in State aid, only $50 on the allowable $75 could be taken into consideration. Thus, LEA Z may be regarded as contributing $600 per pupil under the program and State B would not contribute any State aid.

Example 5. The initial facts are the same as in Example 4, except that LEA Z realizes $600 per pupil from each of the 10 mill taxes. Since LEA Z is regarded as contributing $600 to the equalization program and receives no State aid, no Pub. L. 81-874 funds are taken into consideration under the program.

3. *Examples of wealth neutrality calculations under § 222.64.*

Example 1. State A has an equalization program under which each LEA is guaranteed $900 per pupil less the LEA contribution derived from a uniform required tax of 20 mills.

A minimum of $100 per pupil in paid even if the required tax produces more than $900. Each LEA is permitted to levy additional local taxes. Additional categorical State aid is made available for special cost programs. The State has no limitations on budget, expenditure or local tax effort increases. The State is composed of three LEA's with data as shown.

	LEA No. 1	LEA No. 2	LEA No. 3
Taxable wealth per pupil	$30,000	$60,000	$20,00
Enrollment	2,000	1,000	1,00

	LEA No. 1	LEA No. 2	LEA No. 3
Yield per pupil from required local tax	$600	$1,200	$400
Equalized State aid per pupil	300	100	500
Additional local tax per pupil	100	300	70
Additional State aid per pupil	160	150	155
Total State, intermediate, and local revenues per pupil	1,160	1,750	1,125

LEA No. 1

The $600 per pupil derived from the required local tax rate and the $300 per pupil in State equalization aid are neutral since $900 per pupil was the least amount realized by any LEA for the same required tax effort. One third of the $100 per pupil from the additional local tax is not neutral since the least wealthy LEA, #3, could only realize two-third of the revenue that LEA #1 could at the same tax rate. The $160 per pupil of State categorical aid is neutral. Thus, $1,127 per pupil ($600 + $300 + ⅔ of $100+$160) is wealth neutral and $33 per pupil is not neutral.

LEA No. 2

Of the $1,200 per pupil derived from local required effort $900 is neutral since that was the least amount realized by any LEA for the required local tax rate. The $300 per pupil above the guarantee and the $100 per pupil minimum State equalization aid are not neutral since they exceed the least amount realized by another agency. Two-thirds of the $300 per pupil realized on the additional local tax, $200, is not neutral since the least wealthy, LEA #3, could only realize one-third of the revenue that LEA #2 could at the same rate. The $150 per pupil of State categorical aid is neutral. Thus, $1,150 per pupil ($900 + ⅓ of $300 + $150) is wealth neutral and $600 per pupil is not neutral.

LEA No. 3

The $400 per pupil derived from the required local tax rate and the $500 per pupil in State equalization aid are neutral since $900 is the least amount realized under the equalization program. All of the $70 per pupil realized from the additional local tax is neutral since LEA #3 is the least wealthy in the State. The $155 per pupil of State categorical aid is neutral. Thus, all of the $1,125 per pupil is neutral.

The calculation of the percentage of wealth neutral funds for State A is as follows:

	Total revenues			
	Neutral		Not neutral	
LEA No. 1	$1,127 × 2,000	per pupil pupils	$33 × 2,000	per pupil pupils
	$2,254,000		$66,000	
LEA No. 2	$1,150 × 1,000	per pupil pupils	$600 × 1,000	per pupil pupils
	$1,150,000		$600,000	
LEA No. 3	$1,125 × 1,000	per pupil pupils	None.	
	$1,125,000			
Total neutral revenues	$4,529,000			
Total State, intermediate, and local revenues	$5,195,000	=87.2 pct neutral		

Thus, State A qualifies under § 222.64(a).

Example 2. State B in the prior year had an equalization program which required a 5 mill effort and allowed 5 mills additional leeway. For the required 5 mill effort each LEA was guaranteed $600 per pupil. LEA 2, on a wealth base of $60,000 per pupil, levied the full 10 mills producing $300 per pupil received $300 per pupil of State basic aid, and with the $300 per pupil leeway yield, had revenues of $900 per pupil. LEA #2, on a wealth base of $160,000 per pupil, also levied the full 10 mills producing $800 per pupil from the required 5 mills which exceed the guarantee and thus received no State basic aid. The 5 mill leeway yielded an additional $800 per pupil for a total of $1,600 per pupil.

The State has instituted a new program raising the guarantee to $900 per pupil with a 10 percent budget increase limitation. LEA #1, (with 2,000 pupils), now realizes $300 per pupil from its required effort, receives $600 of State basic aid, received $300 per pupil 1.5 mills of local leeway for a yield of $90 per child because of its budget restraint of $990 per child. ($900 per child plus 10 percent), LEA #2 (with 1,000 pupils), realizes $800 per pupil from its required effort, receives $100 per pupil in State equalization aid, levies 5 mills leeway for another $800 per pupil for a total of $1,700 per pupil which is still within its budget increase limitation of $1,760 per pupil.

Assuming that no other LEA is restrained below the $900 per pupil guarantee and that LEA #1 is the most restrained at $90 per pupil leeway then all of the revenues of LEA #2 above that level are not neutral.

The percentage of neutrality for the State is calculated in the same way as in Example 1. Assuming there are no other LEA's, the percentage of wealth neutral revenues is 80.7, and State B does not qualify.

Example 3. State C has an equalization program under which each LEA is guaranteed $900 per weighted pupil or 110 percent of the prior year's per weighted pupil revenue under the program, whichever is less, minus the LEA contribution derived from a required tax which is uniform for all LEA's guaranteed $900 per pupil and proportionately less for those LEA's guaranteed lesser amounts per pupil. No additional local leeway taxes are allowed. LEA #1 received $850 per pupil under the program in the prior year while LEA #2 received $800 per pupil under the program in the prior year. LEA #1 is limited to the $900 guarantee since 110 percent of its prior year's expenditure exceeds the $900 guarantee. LEA #2 qualifies for an $880 guarantee since 110 percent of $800 equals $880. LEA #2's required tax effort is also proportionately less.

Assume that neither LEA realizes revenues in excess of the guarantee. For LEA #1 (with 10,000 pupils), $880 of the $900 per pupil revenue is wealth neutral and for LEA #2 (with 2,000 pupils), all $880 in per pupil revenue is wealth neutral. (See § 222.64(b)(2)(iii)).

The percentage of neutrality for the State would be calculated as in Example 1. The percentage of wealth neutral revenues is 98.2 and the State qualifies under § 222.64(a).

Example 4. State D has an equalization program which permits different local tax efforts from 1 mill to 10 mills and which guarantees $100 per pupil for each mill levied. LEA #1 taxes at 5 mills and realizes $300 per pupil. Since the guarantee level for 5 mills is $500 per pupil, State D gives LEA #1 $200 in equalization aid. LEA #2 also taxes at 5 mills, but realizes $800 per pupil. Since the guarantee for 5 mills is only $500 per pupil, LEA #2 receives no equalization aid. LEA #3 taxes at 8 mills and realizes $400 per pupil. Since the guarantee at 8 mills is $800 per pupil, LEA #3 receives $400 in equalization aid. LEA #4 taxes at 8 mills, and realizes $1,000 per pupil. Since the guarantee for 8 mills is only $800 per pupil, LEA #4 receives no equalization aid. All of the funds LEA #1 realized under the equalization program are neutral since there is no excess over the guaranteed amount for 5 mills. $300 per pupil of the funds realized by LEA #2 are not neutral, because that is the amount in excess of the amount guaranteed for a 5 mill tax effort under the equalization program, and is attributable to the greater wealth of LEA #2.

All of the funds realized by LEA #3 under the equalization program are neutral since there is no excess over the guaranteed amount for an 8 mill tax effort. $200 per pupil realized by LEA #4 is not neutral, because that is the amount in excess of the guaranteed amount for an 8 mill tax effort under the equalization program and is attributable to the greater wealth of LEA #4.

Example 5. State E has a foundation-type equalization program under which each LEA receives funds for a teacher salary, based on a salary schedule, for each 25 pupils in average daily attendance with additional teacher units allocated for small or sparsely populated districts, and special education programs such as handicapped and vocational classes. Each district also receives under the program a set amount of dollars per teacher unit for expenses other than salaries. Each LEA must make a tax effort of 10 mills to qualify for the foundation equalization aid. The yield from the 10 mills tax is deducted from the amount of the equalization guarantee. There are no State restrictions on budget, expenditure or tax effort increases over prior years. No LEA in the State realizes more than the guaranteed amount for the 10 mill effort. All of the funds realized by all LEAs under the foundation equalization program are neutral. Any excess in the amount of revenues realized by any agency over that realized by any other are attributable to differences in the designated needs. (See § 222.61(b)(3)).

4. *Determination under § 222.66 as to maximum proportion of Pub. L. 81-874 payments that may be taken into consideration by a State under an equalization program.*

[40 FR 16032, Apr. 8, 1975, as amended at 4 FR 65526, Dec. 30, 1977. Redesignated at 4 FR 77368, Nov. 21, 1980]

PART 223—SPECIAL IMPACT AID PROVISIONS FOR LOCAL EDUCATIONAL AGENCIES THAT CLAIM ENTITLEMENTS BASED ON THE NUMBER OF CHILDREN RESIDING ON INDIAN LANDS

Subpart A—General

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223.40 The Assistant Secretary's final determination.
223.41 Judicial review of the Assistant Secretary's final determination.
223.42 Effects of noncompliance with the Assistant Secretary's final determination.

AUTHORITY: Sec. 5(b)(3) of Title I of the Act of September 30, 1950, Pub. L. 81-874, as amended by the Education Amendments of 1978, Pub. L. 95-561 (20 U.S.C. 240(b)(3)), unless otherwise noted.

SOURCE: 46 FR 7199, Jan. 22, 1981, unless otherwise noted.

Subpart A—General

§ 223.1 Purpose.

The purpose of this part is to:

(a) Clarify the requirements which local educational agencies (LEAs) must meet to receive an entitlement under Section 3(d)(2)(D) of the Act and § 223.5 of these regulations;

(b) Establish minimum standards for formulating policies and procedures to ensure the participation of Indian parents and tribes in the education process;

(c) Describe the process that a tribe or its designee shall follow to file a complaint regarding those policies and procedures; and

(d) Establish hearing procedures to resolve complaints.

(Authority: 20 U.S.C. 240(b)(3))

§ 223.2 Applicability of regulations in this part.

(a) The regulations in this part apply to LEAs that claim entitlements under § 223.5.

(b)(1) Except as provided in paragraph (b)(2) of this section, these regulations are designed to ensure participation in the LEA's education program by Indian tribes and parents of Indian children residing on Indian lands.

(2) For purposes of computing the entitlement only, the LEA shall count all children, including any non-Indian children, residing on Indian lands.

(Authority: 20 U.S.C. 238(d)(2)(D); 20 U.S.C. 240(b)(3))

§ 223.3 Applicability of other statutes and regulations.

In addition to the regulations in this part, the following statutes and regulations apply to LEAs that claim entitlements under § 223.5:

(a) Title I (Financial assistance for LEAs in areas affected by Federal activity) of the Act of September 30, 1950, Pub. L. 81-874, as amended in 20 U.S.C. 236 *et seq.* particularly 240(b)(3).

(b) The Impact Aid regulations in 34 CFR Part 222 pertaining to LEAs in areas affected by Federal activity.

(c) The General Education Provisions Act (GEPA) in 20 U.S.C. 1221 *et seq.*

(Authority: 20 U.S.C. 240(b)(3); 20 U.S.C. 1221 *et seq.;* 34 CFR Part 222)

§ 223.4 Definitions.

For purposes of this part, the following definitions apply:

"Act" means Title I (Financial assistance for LEAs in areas affected by Federal activity) of the Act of September 30, 1950, Pub. L. 81-874, as amended. Significant amendments pertinent to this part were made by the Education Amendments of 1978, Pub. L. 95-561.

"Assistant Secretary" means the Assistant Secretary for Elementary and Secondary Education or the Assistant Secretary's designee.

"Child" means any child who is within the age limits for which the applicable State provides free public education.

"Department" means the U.S. Department of Education.

"Entitlement" means, for purposes of this part, the amount of funds (or whatever portion of those funds that is provided by an appropriation) determined by the number of children residing on Indian lands in average daily attendance at the LEA multiplied by the local contribution rate multiplied by 125 percent.

"Indian children" means children residing on Indian lands who are recognized by an Indian tribe as being affiliated with that tribe.

"Indian lands" means:

(a) Real property held in trust by the United States for individual Indians or Indian tribes; and

(b) Real property held by individual Indians or Indian tribes that is subject to restrictions on alienation imposed by the United States.

"Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established under the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

"Local educational agency (LEA)" means a board of education or other legally constituted local authority having administrative control and direction of free public education in a county, township, independent, or other school district located within a State. This term includes any State agency which directly operates and maintains facilities for providing free public education.

"Parent" includes a legal guardian or other person standing in loco parentis.

"Preliminary payment" means a payment equal to 75 percent (or the percentage permitted by an appropriation) of the total impact aid payment received by the LEA for the preceding year.

"Secretary" means the Secretary of the U.S. Department of Education.

(Authority: 20 U.S.C. 240(b)(3); 20 U.S.C. 244)

§ 223.5 Entitlement based on the number of children residing on Indian lands.

(a) To be eligible for an entitlement under this part, an LEA that serves children who reside on Indian lands shall meet:

(1) The eligibility requirements in Section 3(c) of the Act; and

(2) The requirements in § 223.7.

(b) If an LEA meets the requirements in paragraph (a) of this section, the Secretary pays the LEA the entitlement defined in § 223.4.

(c) Except as provided in § 223.8, if an LEA that serves children who reside on Indian lands does not meet the requirements in paragraph (a) of this section, the Secretary may not pay either:

(1) The entitlement defined in § 223.4; or

(2) The preliminary payment defined in § 223.4.

(Authority: 20 U.S.C. 238(d)(2)(D); 20 U.S.C. 240(b)(3)(A))

§ 223.6 Use of entitlement.

An LEA that receives the entitlement referred to in § 223.5 is not required to spend that entitlement exclusively for Indian children or for special programs for Indian children.

(Authority: 20 U.S.C. 240(b)(3); H. Rept. 1137, 95th Cong., 2d Sess. 114 (1978))

§ 223.7 Requirements to receive entitlement.

To receive the entitlement referred to in § 223.5:

(a) An LEA formed before November 1, 1978 shall have complied with the requirements under Section 5(b)(3) of the Act for establishing policies and procedures by the end of the 1979–1980 school year; or

(b) An LEA formed after November 1, 1978 shall:

(1) Establish the policies and procedures described in §§ 223.10–223.11, in consultation with and based on information from tribal officials and parents of Indian children, within one year of its formation; and

(2) Include in its application for payments under the Act:

(i) An assurance that the LEA established these policies and procedures in consultation with and based on information from tribal officials and parents of Indian children; and

(ii) A copy of the policies and procedures.

(Authority: 20 U.S.C. 240(b)(3)(A))

§ 223.8 Waiver of deadline for establishing policies and procedures.

(a)(1) If an LEA cannot meet its deadline in § 223.7 for establishing policies and procedures, the LEA may request the Secretary to waive that deadline and set a new one.

(2) The LEA's request for a waiver must:

(i) Be in writing;

(ii) Provide a full justification of the need for a waiver;

(iii) Indicate when policies and procedures can be established; and

(iv) Include any supporting information the Secretary may require.

(b)(1) The Secretary may waive the deadline in § 223.7 for establishing policies and procedures and set a new one if the LEA shows good cause.

(2) In determining whether the LEA has shown good cause, the Secretary considers the following factors:

(i) The progress of the LEA in establishing its policies and procedures.

(ii) Administrative obstacles faced by the LEA in establishing its policies and procedures.

(iii) Exceptional or unforeseen circumstances.

(c) If the Secretary decides to grant the LEA's request for a waiver, the Secretary may vary the method for paying the LEA's entitlement under § 223.5, depending on the circumstances underlying the waiver request. The methods available to the Secretary include the following:

(1) Pay the LEA the full entitlement for the current year in which the Secretary grants the waiver.

(2) Grant the waiver but pay the LEA the full entitlements for past years retroactively when the LEA establishes it policies and procedures.

(3) Grant the waiver but only pay the entitlement prospectively from the year in which the LEA establishes policies and procedures.

(d) If the Secretary denies the LEA's request for a waiver, the Secretary may not pay either:

(1) The entitlement referred to in § 223.5; or

(2) The preliminary payment defined in § 223.4.

(Authority: 20 U.S.C. 240(b)(3)(A))

§ 223.9 [Reserved]

Subpart B—Policies and Procedures

§ 223.10 Required policies and procedures.

The policies and procedures required under §223.7 must ensure that an LEA that serves children residing on Indian lands:

(a) Gives tribal officials and parents of Indian children the opportunity to comment on the participation of Indian children on an equal basis in the school program with all other children educated by the LEA;

(b) Disseminates to tribal officials and parents of Indian children:

(1) The Pub. L. 81-874 application;

(2) Any evaluations of education programs assisted with funds provided under the Act; and

(3) Any program plans for education programs that the LEA plans to initiate or eliminate;

(c) Consults actively and involves regularly tribal officials and parents of Indian children in the planning and development of education programs assisted with funds provided under the Act; and

(d) Affords tribal officials and parents of Indian children an opportunity to:

(1) Make recommendations concerning:

(i) The needs of their children; and

(ii) The ways by which they can assist their children in realizing the benefits to be derived from the education programs assisted with funds provided under the Act; and

(2) Present their overall views on the education program in the LEA, including:

(i) The operation of the LEA's education program; and

(ii) The degree of parental participation allowed.

(Authority: 20 U.S.C. 240(b)(3)(B))

§ 223.11 Minimum standards for establishing policies and procedures.

To accomplish the objectives in § 223.10, an LEA's policies and procedures must include, at a minimum:

(a) Specific procedures for how the LEA will:

(1) Give tribal officials and parents of Indian children the opportunity to comment on the participation of Indian children on an equal basis in the education program;

(2) Assess the extent to which Indian children do participate on an equal basis; and

(3) Modify its education program to allow Indian children to participate on an equal basis;

(b) Specific procedures for disseminating the information required in § 223.10(b). This dissemination must:

(1) Take place in a timely manner; and

(2) Ensure that tribal officials and parents of Indian children have had adequate time and opportunity to present their views;

(c) A description of how the LEA will actively consult and regularly involve tribal officials and parents of Indian children in the planning and development of education programs assisted with funds provided under the Act;

(d) A description of the LEA's methods to afford tribal officials and parents of Indian children the opportunity to make recommendations and to present their views as provided in § 223.10(d). This description should include specific ways the LEA will gather information concerning Indian views, including the frequency, location, and time of meetings; and

(e) Specific procedures for:

(1) Assessing the meaningfulness of Indian input; and

(2) Modifying the LEA's policies and procedures, if necessary, based on that input.

(Authority: 20 U.S.C. 240(b)(3)(B); 20 U.S.C. 1221e-3(a)(1); H. Rept. 1137, 95th Cong., 2d Sess. 114-115 (1978))

§ 223.12 Review by LEAs of policies and procedures.

(a) Each LEA that has established policies and procedures under § 223.7 shall review those policies and procedures annually to ensure that they:

(1) Meet the minimum standards in § 223.11; and

(2) Continue to provide for an adequate level of Indian participation.

(b) If an LEA determines that its policies and procedures do not meet the requirements in paragraph (a)(1)-(2) of this section, the LEA shall amend its policies and procedures to conform with those requirements.

(c) An LEA that must amend its policies and procedures under paragraph (b) of this section shall send a copy of those amended policies and procedures to:

(1) The Secretary; and

(2) The affected tribe or tribes.

thority: 20 U.S.C. 1221e-3(a)(1))

223.13 Review by the Secretary of policies and procedures.

(a) The Secretary periodically re-
ews an LEA's policies and procedures
ensure that they meet the mini-
m standards in § 223.11.

(b) If the Secretary determines that
e LEA's policies and procedures do
t meet the minimum standards in
223.11, the LEA shall make the nec-
ary changes within 60 days after re-
iving the Secretary's determination.

(c) If the LEA fails to correct its
licies and procedures within 60 days,
e Secretary withholds the LEA's en-
tlement according to § 223.42(b).

thority: 20 U.S.C. 1221e-3(a)(1))

223.14—223.19 [Reserved]

bpart C—Complaint Procedures

223.20 Contents of a complaint.

r purposes of this part, a com-
aint is a signed statement that in-
des:

a) An allegation that an LEA has
iled to:

1) Establish adequate policies and
cedures under §§ 223.10–223.11 to
sure the participation of Indian par-
ts and tribes in the education proc-
;

2) Adhere to these policies and pro-
dures; or

3) Take into consideration meaning-
Indian input in designing the edu-
tion program;

b) Information that supports the al-
ation;

c) A specific request for relief; and

d) A statement describing what
ps it has taken under § 223.23(b) to
olve with the LEA the matters on
ich the complaint is based.

thority: 20 U.S.C. 240(b)(3)(C)(i); 20
.C. 1221e-3(a)(1); H. Rept. 1137, 95th
g., 2d Sess. 115 (1978))

223.21 Who may file a complaint.

a)(1) Any tribe, or its designee, that
students attending an LEA's
ool may, in its discretion and with-
regard to the requirements of any
er provision of law, file a written complaint with the Assistant Secretary regarding any action of the LEA pursuant to, or relevant to, the matters in § 223.20(a).

(2) If a tribe files a complaint through a designee, the tribe shall acknowledge in writing in the complaint that the designee is authorized to act on its behalf.

(b)(1) Parents of Indian children may not file a complaint directly with the Assistant Secretary.

(2) These parents shall submit their grievances to the tribe or its designee, although neither the tribe nor its designee is obligated to file these grievances in a complaint with the Assistant Secretary.

(c) A complaint filed under paragraph (a) of this section need not reflect the views of a majority of the parents of Indian children attending the LEA's schools.

(Authority: 20 U.S.C. 240(b)(3)(C)(i); H. Rept. 1137, 95th Cong., 2d Sess. 115 (1978))

§ 223.22 Where to file a complaint.

To file a complaint, a tribe must:

(a) Designate the complaint "SAFA Indian Complaint"; and

(b) Send it to the Assistant Secretary for Elementary and Secondary Education.

(Authority: 20 U.S.C. 240(b)(3)(C)(i))

§ 223.23 When to file a complaint.

A tribe may file a complaint with the Assistant Secretary only if:

(a) The LEA has complied with the requirements in § 223.7; and

(b) The tribe has taken reasonable steps to resolve with the LEA the issues on which the complaint is based.

(Authority: 20 U.S.C. 240(b)(3)(C)(i); 20 U.S.C. 1221e-3(a)(1))

§ 223.24 Receipt of a complaint by the Assistant Secretary.

The Assistant Secretary considers a complaint to have been received only after the Assistant Secretary determines that the complaint:

(a) Satisfies the requirements in §§ 223.20–223.21 and § 223.23; and

(b) Is in writing and signed by a tribal official or the tribe's authorized designee.

(Authority: 20 U.S.C. 240(b)(3)(C)(i))

§ 223.25 Dismissal of a complaint.

(a) If the Assistant Secretary determines that a complaint fails to meet the requirements in § 223.24, the Assistant Secretary notifies the tribe or its designee that the complaint has been dismissed for purposes of invoking the hearing procedures in §§ 223.30–223.41.

(b) Each notice that a complaint has been dismissed includes the reasons why the Assistant Secretary determined that the complaint did not meet the requirements in § 223.24.

(c) Notice that a complaint has been dismissed does not preclude other efforts to investigate or resolve the issues raised in the complaint, including the filing of an amended complaint.

(Authority: 20 U.S.C. 240(b)(3)(C)(i); 20 U.S.C. 1221e-3(a)(1))

§ 223.26 Consolidation of complaints.

The Assistant Secretary may consolidate complaints involving the same tribe or LEA.

(Authority: 20 U.S.C. 240(b)(3)(C)(viii))

§§ 223.27—223.29 [Reserved]

Subpart D—Hearing Procedures

§ 223.30 Applicability of hearing procedures in this subpart.

The hearing procedures in this subpart apply only to proceedings under Section 5(b)(3)(C) of the Act.

(Authority: 20 U.S.C. 240(b)(3)(C)

§ 223.31 Applicability of other laws.

The following provisions do not apply to proceedings under this subpart:

(a) Administrative Procedure Act.

(b) Federal Rules of Civil Procedure.

(c) Federal Rules of Evidence.

(Authority: 20 U.S.C. 240(b)(3)(C); 20 U.S.C. 1221e-3(a)(1))

§ 223.32 Parties to a hearing.

The parties to a hearing under thi subpart are:

(a) The complaining tribe or tribe and

(b) The affected LEA or LEAs.

(Authority: 20 U.S.C. 240(b)(3)(C)

§ 223.33 Notice.

Within 10 working days after recei ing a complaint, the Assistant Secretary:

(a) Appoints a hearing examiner t conduct the hearing;

(b) Selects a time for the hearing s that the hearing occurs no more tha 30 days after the appointment of hearing examiner;

(c) Designates a place for the hea ing that is, to the extent possible:

(1) Near the LEA; or

(2) At another location convenien to the tribe and the LEA, if the Assi ant Secretary determines there is goo cause to designate another location;

(d) Notifies the tribe and the LEA the time, place, and nature of th hearing; and

(e) Sends copies of the complaint the LEA and the tribe.

(Authority: 20 U.S.C. 240(b)(3)(C)(ii))

§ 223.34 LEA's reply to the complaint.

Within 15 days after receiving th notice described in § 223.33, the LE shall file with the Assistant Secretar its reply to the charges in the co plaint.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 223.35 General procedural rules.

(a) *Communications.* No party sh communicate orally or in writing wi the hearing examiner or the Assist Secretary on matters under revie except minor procedural matte unless all parties to the complaint a given:

(1) Timely and adequate notice the communication; and

(2) Reasonable opportunity to r spond.

(b) *Submission of documents.* F each document that a party subm the party shall:

(1) File one copy for inclusion in th record of the proceedings; and

(2) Provide a copy to each of the other parties to the proceedings.

(c) *Record.* A record of the proceedings will be established and maintained by the Assistant Secretary.

(Authority: 20 U.S.C. 240(b)(3)(C); 20 U.S.C. 1221e-3(a)(1))

§ 223.36 Conduct of the hearing.

(a) *Public hearing.* The hearing must be open to the public.

(b) *Representation by counsel.* Parties may be represented by counsel.

(c) *Evidence.* (1) Each party may submit oral and written testimony that is relevant to the issues in the proceedings.

(2) A party may object to evidence it considers to be irrelevant or unduly repetitious.

(d) *Authority and responsibilities of the hearing examiner.* (1) The hearing examiner may regulate the course of the proceedings and the conduct of the parties during those proceedings. The hearing examiner takes all steps necessary to conduct a fair and impartial proceeding, to avoid delay, and to maintain order, including the following:

(i) The hearing examiner may clarify, simplify, or define the issues or consider other matters that may aid in the disposition of the complaint.

(ii) The hearing examiner may direct the parties to exchange relevant documents or information.

(iii) The hearing examiner may receive, rule on, exclude, or limit evidence.

(iv) Although hearings are open to the general public, the hearing examiner may establish reasonable rules governing public attendance at the proceedings.

(v) The hearing examiner may examine witnesses.

(2) The hearing examiner may interpret applicable statutes and regulations but may not waive them or rule on their validity.

(e) *Transcripts.* (1) The Assistant Secretary:

(i) Arranges for the preparation of a transcript of each hearing;

(ii) Retains the original transcript as part of the record of the proceedings; and

(iii) Provides one copy of the transcript to each party.

(2) Additional copies of the transcript are available on request and with payment of the reporting service's reproduction fee.

(f) *Hearing costs.* Each party shall bear only its own costs in the proceeding.

(Authority: 20 U.S.C. 240(b)(3)(C)(iii)-(iv); 20 U.S.C. 1221e-3(a)(1))

§ 223.37 Opportunity to submit additional evidence.

(a) Each party may submit to the hearing examiner additional evidence that is relevant to the issues raised at the hearing.

(b) The hearing examiner must receive each party's additional evidence within 10 days after the hearing.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 223.38 The hearing examiner's findings and recommendations.

Within 30 days after the hearing, the hearing examiner:

(a) Makes, on the basis of the record, written findings of fact and recommendations concerning any appropriate remedial action that should be taken;

(b) Submits those findings and recommendations, along with the hearing record, to the Assistant Secretary; and

(c) Sends a copy of those findings and recommendations to each party.

(Authority: 20 U.S.C. 240(b)(3)(C)(v); 20 U.S.C. 1221e-3(a)(1))

§ 223.39 Opportunity to comment on the hearing examiner's findings and recommendations.

(a) Each party may file with the Assistant Secretary comments on the hearing examiner's findings and recommendations.

(b) The Assistant Secretary must receive each party's comments within 10 days after the party receives a copy of the hearing examiner's findings and recommendations.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 223.40 The Assistant Secretary's final determination.

(a) Within 30 days after receiving the hearing record and the hearing examiner's findings and recommendations, the Assistant Secretary makes, on the basis of the record, a written determination that includes:

(1) Any appropriate remedial action that the LEA must take;

(2) A schedule for completing any remedial action; and

(3) The reasons for the Assistant Secretary's decision.

(b) After completing the final determination required by paragraph (a) of this section, the Assistant Secretary sends the parties a copy of:

(1) The hearing record;

(2) The hearing examiner's findings and recommendations; and

(3) The Assistant Secretary's final determination.

(c) The Assistant Secretary's final determination under paragraph (a) of this section is the final action of the Department concerning the complaint.

(Authority: 20 U.S.C. 240(b)(3)(C)(vi)-(vii))

§ 223.41 Judicial review of the Assistant Secretary's final determination.

If a party is dissatisfied with the Assistant Secretary's final determination, the party may seek judicial review before a court of competent jurisdiction.

(Authority: 20 U.S.C. 240(b)(3)(C)(vii))

§ 223.42 Effects of noncompliance with the Assistant Secretary's final determination.

(a) *Determination of compliance.* (1) Undertaken the required remedial action; or

(2) Failed to undertake the remedial action within the time established and the Secretary determines that an extension of time will not effectively encourage the required remedial action.

(b) *Withholding by the Secretary.* (1) Except as provided in paragraphs (b)(1)(i)-(ii) of this section, if the Secretary determines under paragraph (a)(2) of this section that the LEA has failed to undertake the remedial action, the Secretary withholds payment of all funds to which an LEA is entitled under Section 238(d)(2)(D) of the Act until that remedial action is undertaken.

(i) The Secretary does not withhold funds if the tribe or its designee requests in writing that these funds be released to the LEA.

(ii) The Secretary may not withhold funds during the course of the school year if the Secretary determines that a withholding would substantially disrupt the education programs of the LEA.

(2) If an LEA is aggrieved by the Secretary's action under paragraph (b)(1) of this section, the LEA may request a hearing under Section 5(g) of the Act.

(c) *Election of alternative services by the tribe.* (1) If the Secretary determines under paragraph (a)(2) of this section that the LEA has failed to undertake the remedial action, the affected tribe may elect to:

(i) Contract with the Bureau of Indian Affairs under Title I of the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638 (25 U.S.C. 450 *et seq.*) to provide educational services previously provided by the LEA; or

(ii) Have a Bureau of Indian Affairs' school provide those educational services.

(2) (i) If the affected tribe exercises its option under paragraph (c)(1) of this section, any Indian students affiliated with that tribe who wish to remain in attendance at the LEA against whom the complaint was filed may be counted by the LEA for the purpose of receiving funds under Section 3(d)(2)(D) of the Act.

(ii) If Indian students remain affiliated with the LEA under paragraph (c)(2)(i) of this section:

(A) The Secretary may not withhold funds under paragraph (b)(1) of this section that are based on the number of Indian students who remain affiliated with the LEA; and

(B) The tribe may not file any further complaints with respect to these Indian students.

(Authority: 20 U.S.C. 240(b)(3)(D)-(E); 20 U.S.C. 240 note)

[46 FR 7199, Jan. 22, 1981, as amended at 51 FR 4497, Feb. 5, 1986]

PART 230—DRUG-FREE SCHOOLS AND COMMUNITIES—HAWAIIAN NATIVES PROGRAM

Subpart A—General

Sec.
230.1 What is the Drug-Free Schools and Communities—Hawaiian Natives Program?
230.2 Who is eligible to apply for an award?
230.3 What activities may the Secretary fund?
230.4 What regulations apply?
230.5 What definitions apply?

Subpart B—[Reserved]

Subpart C—How Does the Secretary make an Award?

230.20 How does the Secretary evaluate an application?
230.21 What selection criteria does the Secretary use?

Subpart D—What Conditions Must Be Met After an Award?

230.30 What conditions must a grantee meet in coordinating services?

AUTHORITY: 20 U.S.C. 4644.

SOURCE: 52 FR 26919, July 16, 1987, unless otherwise noted.

Subpart A—General

§ 230.1 What is the Drug-Free Schools and Communities—Hawaiian Natives Program?

The Drug Free Schools and Communities—Hawaiian Natives Program provides financial assistance to organizations primarily serving and representing Hawaiian Natives to plan, conduct, and administer programs for Hawaiian natives that are authorized by and consistent with the Drug-Free Schools and Communities Act of 1986 (the "Act").

(Authority: 20 U.S.C. 4644)

§ 230.2 Who is eligible to apply for an award?

Any organization primarily serving and representing Hawaiian natives, that is recognized by the Governor of Hawaii, may apply for a grant or cooperative agreement under this program.

(Authority: 20 U.S.C. 4644)

§ 230.3 What activities may the Secretary fund?

The Secretary provides assistance to plan, conduct, and administer activities that are authorized by and consistent with the Act for the benefit of Hawaiian Natives. These activities may include, but are not limited to, the following:

(a) Local broadly-based programs for drug and alcohol abuse prevention, early intervention, rehabilitation referral, and education for all age groups.

(b) Training programs concerning drug abuse education and prevention for teachers, counselors, other educational personnel, parents, local law enforcement officials, judicial officials, other public service personnel, and community leaders.

(c) The development and distribution of educational and informational materials to provide public information (through the media and otherwise) for the purpose of achieving a drug-free society.

(d) Technical assistance to help community-based organizations and local and intermediate educational agencies and consortia in the planning and implementation of drug abuse prevention, early intervention, rehabilitation referral, and education programs.

(e) Activities to encourage the coordination of drug abuse education and prevention programs with related community efforts and resources.

(Authority: 20 U.S.C. 4132(a)(1-5), 4644)

§ 230.4 What regulations apply?

The following regulations apply to the Drug-Free Schools and Communities—Hawaiian Natives Program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of Grants), Part 75 (Direct Grant Programs), Part 77 (Definitions That Apply to Department Programs), and Part 78 (Education Appeal Board).

(b) The regulations in this Part 230.

(Authority: 20 U.S.C. 4644)

§ 230.5 What definitions apply?

(a) *Definitions in the Act.* The following terms used in this part are defined in the Act: Hawaiian Native (Section 4134(b)) Drug abuse education and prevention
(Section 4141(b)(1))

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Department
EDGAR
Grant
Secretary

(c) *Other definitions.* The following definition also applies to this part:

Act means the Drug-Free Schools and Communities Act of 1986.

(Authority: 20 U.S.C. 4644)

Subpart B—[Reserved]

Subpart C—How Does the Secretary Make an Award?

§ 230.20 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application for a grant or cooperative agreement on the basis of the criteria in § 230.21.

(b) The Secretary awards up to 100 points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

(Authority: 20 U.S.C. 4644)

§ 230.21 What selection criteria does the Secretary use?

The Secretary uses the following selection criteria in evaluating each application:

(a) *Understanding of problems and needs.* (15 points) The Secretary reviews each application to determine how adequately the applicant has identified problems and needs related to alcohol and drug abuse among Hawaiian Natives.

(b) *Plan to address problems and needs.* (30 points) The Secretary reviews each application to determine the quality of the proposed plan to address the identified problems and needs.

(c) *Coordination with other activities.* (15 points) The Secretary reviews each application to determine:

(1) The degree to which the applicant has coordinated with State and other organizations administering alcohol and drug abuse programs in developing the application; and

(2) The adequacy of the applicant's plans for coordination with State and national alcohol and drug abuse prevention activities.

(d) *Management plan.* (15 points) The Secretary reviews each application to determine the quality of the plan of operation for the applicant's program, including:

(1) The extent to which the plan is effective and ensures proper and efficient administration of the program;

(2) The manner in which the plan provides for the applicant's use of resources and personnel to achieve its objectives;

(3) The adequacy of the resources the applicant plans to use—including facilities, equipment, and supplies;

(4) How the plan will ensure that the program will select participants, who are otherwise eligible to participate, for activities without regard to race, color, sex, age, or handicapping condition; and

(5) The schedules of work and completion dates for activities identified in the plan.

(e) *Quality of key personnel.* (20 points) (1) The Secretary reviews each application to determine the quality of key personnel proposed for the program, including:

(i) The qualifications of the program director;

(ii) The qualifications of each of the other key personnel;

(iii) The time that each person referred to in paragraphs (e)(1) (i) and (ii) of this section will commit to the program; and

(iv) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, sex, national origin, age, or handicapping condition.

(2) To determine personnel qualifications under paragraphs (e)(1) (i) and

(ii) of this section, the Secretary considers:

(i) Experience and training in alcohol and drug abuse education and prevention; and

(ii) Any other qualifications that pertain to the quality of the program and services, including the capacity for training, evaluation, and dissemination.

(f) *Evaluation plan.* (5 points) The Secretary reviews each application to determine the quality of the applicant's plan to evaluate the effectiveness of the proposed program, including the extent to which the methods of evaluation are appropriate, are objective, and produce data that are quantifiable.

(Authority: 20 U.S.C. 4644)

Subpart D—What Conditions Must Be Met After an Award?

§ 230.20 What conditions must a grantee meet in coordinating services?

In carrying out its responsibilities under this program, each grantee shall:

(a) Coordinate its activities and services with local, State, and national efforts to combat alcohol and drug abuse; and

(b) Ensure that any materials produced or distributed with funds awarded to the applicant under the Act reflect the message that illicit drug use is wrong and harmful.

(Authority: 20 U.S.C. 4644)

PART 235—DRUG-FREE SCHOOLS AND COMMUNITIES—REGIONAL CENTERS

Subpart A—General

Sec.

235.1 What is the Drug-Free Schools and Communities—Regional Centers Program?
235.2 Who is eligible for an award?
235.3 What responsibilities must a center carry out with its award?
235.4 What activities must a center conduct in training school teams?
235.5 What activities must a center conduct in assisting SEAs?
235.6 What activities must a center conduct in assisting LEAs and IHEs?
235.7 What activities must a center conduct in evaluating and disseminating information?
235.8 What geographic regions do the centers serve?
235.9 What regulations apply?
235.10 What definitions apply?

Subpart B—[Reserved]

Subpart C—How Does the Secretary Make an Award?

235.30 How does the Secretary evaluate an application?
235.31 What selection criteria does the Secretary use?

Subpart D—What Conditions Must Be Met After an Award?

235.40 What conditions must a center meet in coordinating services throughout its region?
235.41 What other conditions must a center meet?

AUTHORITY: 20 U.S.C. 4645, unless otherwise noted.

SOURCE: 52 FR 26923, July 16, 1987, unless otherwise noted.

Subpart A—General

§ 235.1 What is the Drug-Free Schools and Communities—Regional Centers Program?

This program establishes and maintains five regional alcohol and drug abuse education and prevention centers. These centers train school teams, assist State and local educational agencies (SEAs and LEAs) and institutions of higher education (IHEs), and evaluate and disseminate information on effective programs and strategies to combat alcohol and drug abuse. The primary purpose of each center is to help schools and communities eliminate alcohol and drug abuse by young people. For example, centers help clients formulate and enforce school policies against illegal alcohol and drug use.

(Authority: 20 U.S.C. 4645)

§ 235.2 Who is eligible for an award?

The Secretary may make an award for a regional center to a public or private organization, institution, or agency, or to an individual.

§ 235.3 What responsibilities must a center carry out with its award?

Each regional center shall use funds awarded by the Secretary to carry out the following responsibilities:

(a) Train school teams to assess the scope and nature of their drug abuse and alcohol abuse problems, mobilize the community to address these problems, design appropriate curricula, identify students at highest risk and refer them to appropriate treatment, and institutionalize long term effective drug and alcohol abuse programs, including long range technical assistance, evaluation, and followup on that training;

(b) Assist SEAs in coordinating and strengthening drug abuse and alcohol abuse education and prevention programs;

(c) Assist LEAs and IHEs in developing appropriate pre-service and in-service training programs for educational personnel; and

(d) Evaluate and disseminate information on effective alcohol and drug abuse education and prevention programs and stategies.

(Authority: 20 U.S.C. 4645)

§ 235.4 What activities must a center conduct in training school teams?

(a) In training school teams under § 235.3(a), each center shall provide information and assistance related to:

(1) Developing and enforcing comprehensive school policies against illegal alcohol and drug use;

(2) The causes, symptoms, and effects of alcohol and drug abuse;

(3) Laws governing the use of alcohol and drugs, as well as laws governing school discipline;

(4) Alcohol and drug abuse prevention programs that have been effective in other school districts, including practical assistance in implementing those programs; and

(5) Collecting data that measure how effective each school-based program is in eliminating student alcohol and drug abuse.

(b) Each center shall offer training in locations and at times that are appropriate to the needs of its clients.

(Authority: 20 U.S.C. 4645)

§ 235.5 What activities must a center conduct is assisting SEAs?

In assisting SEAs under § 235.3(b), each center shall provide information and assistance related to:

(a) Developing and enforcing comprehensive school policies against illegal alcohol and drug use;

(b) Assessing the nature and scope of alcohol and drug abuse problems in the schools of the State; and

(d) Developing appropriate pre-service and in-service training programs for educational personnel.

(Authority: 20 U.S.C. 4645)

§ 235.6 What activities must a center conduct in assisting LEAs and IHEs?

In assisting LEAs and IHEs under § 235.3(c), each center shall provide practical assistance to, and promote cooperative efforts between, those agencies and institutions in:

(a) Developing and improving programs to train educational personnel in alcohol and drug abuse prevention; and

(b) Preparing educational personnel to train other educational personnel in alcohol and drug abuse prevention.

(Authority: 20 U.S.C. 4645)

§ 235.7 What activities must a center conduct in evaluating and disseminating information?

In evaluating and disseminating information under § 235.3(d), each center shall:

(a) Develop appropriate methods for evaluating the effectiveness of programs in preventing alcohol and drug abuse;

(b) Obtain, analyze, and disseminate, as appropriate, data from the center's clients as well as from other sources that can be used to measure the effectiveness of activities conducted by the center in eliminating alcohol and drug abuse; and

(c) Disseminate information to LEAs, SEAs, IHEs, and communities in the region on model programs and rategies to prevent alcohol and drug abuse.

(Authority: 20 U.S.C. 4645)

§ 235.8 What geographic regions do the centers serve?

The regional centers established under this program shall serve the following geographic regions:

(a) *Northeast*

Connecticut
Delaware
Maine
Maryland
Massachusetts
New Hampshire
New Jersey
New York
Ohio
Pennsylvania
Rhode Island
Vermont

(b) *Southeast*

Alabama
District of Columbia
Florida
Georgia
Kentucky
North Carolina
Puerto Rico
South Carolina
Tennessee
Virginia
Virgin Islands
West Virginia

(c) *Midwest*

Indiana
Illinois
Iowa
Michigan
Minnesota
Missouri
Nebraska
North Dakota
South Dakota
Wisconsin

(d) *Southwest*

Arizona
Arkansas
Colorado
Kansas
Louisiana
Mississippi
New Mexico
Oklahoma
Texas
Utah

(e) *West*

Alaska
American Samoa
California
Guam
Hawaii
Idaho
Montana
Nevada
Northern Mariana Islands
Oregon
Trust Territory of the Pacific Islands
Washington
Wyoming

(Authority: 20 U.S.C. 4645)

§ 235.9 What regulations apply?

The following regulations apply to the Drug-Free Schools and Communities–Regional Centers Program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of Grants), Part 75 (Direct Grant Programs), Part 77 (Definitions That Apply to Department Regulations), Part 78 (Education Appeal Board), and Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(b) The regulations in this Part 235.

(Authority: 20 U.S.C. 4645)

§ 235.10 What definitions apply?

(a) *Definitions in the Act.* The following terms used in this part are defined in section 4141 of the Act:

Drug abuse education and prevention
Illicit drug use
Institution of higher education

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Application
Award
Department
EDGAR
Local educational agency
Private
Public
Secretary
State
State educational agency

(c) *Other definitions.* The following definition also applies to this part:

Act means the Drug-Free Schools and Communities Act of 1986.

(Authority: 20 U.S.C. 4645)

Subpart B—[Reserved]

Subpart C—How Does the Secretary Make an Award?

§ 235.30 How does the Secretary evaluate an application?

(a) To make awards, the Secretary conducts a separate competition for each of the geographic regions described in § 235.8. Within each region the Secretary evaluates an application on the basis of the criteria in § 235.31.

(b) The Secretary awards up to 100 points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

(Authority: 20 U.S.C. 4645)

§ 235.31 What selection criteria does the Secretary use?

The Secretary uses the following criteria to evaluate an application:

(a) *Understanding of regional needs.* (10 points) The Secretary reviews each application to determine how adequately the applicant has assessed the alcohol and drug-related problems and needs in its region.

(b) *Plan to address regional needs.* (40 points) The Secretary reviews each application to determine the quality of the applicant's detailed plan to carry out the responsibilities and activities listed in §§ 235.3 through 235.7 of this part to address the problems and needs of its region.

(c) *Advisory structure.* (10 points) The Secretary reviews each application to determine:

(1) The breadth of representation on the applicant's proposed advisory structure;

(2) The extent to which representatives of appropriate groups have agreed to serve in an advisory capacity; and

(3) The adequacy of the applicant's plans to involve the advisory structure in the activities of the proposed center.

(d) *Coordination with other activities, balance of services.* (10 points) The Secretary reviews each application to determine:

(1) The degree to which the applicant has coordinated with State and regional organizations administering alcohol and drug abuse programs in developing the application;

(2) The adequacy of the applicant's plans for coordination with State, regional, and national alcohol and drug abuse prevention activities; and

(3) The adequacy of the applicant's plans to achieve balance in providing services throughout the region.

(e) *Management plan.* (15 points) The Secretary reviews each application to determine the quality of the plan of operation for the center, including:

(1) The extent to which the plan is effective and ensures proper and efficient administration of the center;

(2) The manner in which the plan provides for the applicant to use resources and personnel to achieve its objectives;

(3) The adequacy of the resources the applicant plans to use—including facilities, equipment, and supplies;

(4) How the plan will ensure that the center will select participants, who are otherwise eligible to participate, for activities of the center without regard to race, color, national orig sex, age, or handicapping conditio and

(5) The schedules of work and co pletion dates for activities identified the plan.

(f) *Quality of key personnel.* (points) (1) The Secretary reviews ea application to determine the quality key personnel proposed for the cente including:

(i) The qualifications of the cent director;

(ii) The qualifications of each of th other key personnel;

(iii) The time that each person r ferred to in paragraphs (f)(1) (i) an (ii) of this section will commit to th center; and

(iv) How the center, as part of i nondiscriminatory employment pra tices, will ensure that its personnel a selected for employment withou regard to race, color, sex, nation origin, age, or handicapping conditio

(2) To determine personnel quali cations under paragraphs (f)(1) (i) an (ii) of this section, the Secretary co siders:

(i) Experience and training in alc hol and drug abuse education and pre vention; and

(ii) Any other qualifications th pertain to the quality of the center program and services, including the c pacity for training, evaluation, a dissemination.

(g) *Evaluation plan.* (5 points) Th Secretary reviews each application t determine the quality of the appl cant's plan to evaluate the effectiv ness of the center, including th extent to which the methods of ev uation are appropriate, are objectiv and produce data that are quanti able.

(Approved by the Office of Managem and Budget under control number 18 0529.)

(Authority: 20 U.S.C. 4645)

Subpart D—What Conditions Must Be Met After an Award?

§ 235.40 What conditions must a center meet in coordinating services throughout its region?

In carrying out its general responsibilities under the Act, each center shall:

(a) Actively acquaint SEAs, LEAs, and IHEs with the range of services offered by the center;

(b) Establish an advisory structure that broadly represents the region and includes representatives of SEAs, LEAs, and IHEs, judicial and law enforcement agencies, and Governors of States within the region;

(c) Achieve balance throughout the region in the provision of the center's services;

(d) Coordinate the center's activities with local, State, national, and other regional efforts to combat alcohol and drug abuse; and

(e) Cooperate with the Department, its contractors, and other regional centers in efforts to eliminate alcohol and drug abuse throughout the Nation.

(Authority: 20 U.S.C. 4645)

§ 235.41 What other conditions must a center meet?

Each center must ensure that any materials produced or distributed with funds awarded to the center under the Act reflect the message that illicit drug use is wrong and harmful.

(Authority: 20 U.S.C. 4645)

PART 237—CHRISTA MCAULIFFE FELLOWSHIP PROGRAM

Subpart A—General

Sec.
237.1 What is the Christa McAuliffe Fellowship Program?
237.2 Who is eligible to apply under the Christa McAuliffe Fellowship Program?
237.3 How are awards distributed?
237.4 In what amount are fellowships awarded?
237.5 For what purposes may a fellow use an award?
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Subpart B—How Does One Apply For An Award?

237.10 How does an individual apply for a fellowship?

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237.20 What are statewide panels?
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Subpart D—What Conditions Must Be Met By Fellows?

237.30 What is the duration of a fellowship?
237.31 May a fellowship be awarded for two consecutive years?
237.32 What records and reports are required from fellows?
237.33 What is the service requirement for a fellowship?
237.34 What are the requirements for repayment of the fellowship?

AUTHORITY: 20 U.S.C. 1113-1113e.

SOURCE: 52 FR 26466, July 14, 1987, unless otherwise noted.

Subpart A—General

§ 237.1 What is the Christa McAuliffe Fellowship Program?

The Christa McAuliffe Fellowship Program (CMFP) is designed to reward excellence in teaching by encouraging outstanding teachers to continue their education, to develop innovative programs, to consult with or assist LEAs, private schools, or private school systems, and to engage in other educational activities that will improve the knowledge and skills of teachers and the education of students.

(Authority: 20 U.S.C. 1113, 1113b)

§ 237.2 Who is eligible to apply under the Christa McAuliffe Fellowship Program?

An individuals is eligible to apply for a Christa McAuliffe Fellowship if the individuals at the time of application:

(a)(1) Is a citizen or national of the United States;

(2) Is a permanent resident of the United States;

(3) Provides evidence from the Immigration and Naturalization Service that the individuals is in the Unites Stated for other than a temporary purpose with the intention of becoming a citizen or permanent resident; or

(4) Is a permanent resident of the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, or the Northern Mariana Islands; and

(b) Is a full-time teacher in a public or private elementary or secondary school.

(Authority: 20 U.S.C. 1113b, 1113d(a))

§ 237.3 How are awards distributed?

(a) Except as provided in section 563(a)(3) of the Act, the Secretary awards one national teacher fellowship under this part to an eligible teacher in each of the following:

(1) Each congressional district in each of the fifty States.

(2) The District of Columbia.

(3) The Commonwealth of Puerto Rico.

(4) Guam.

(5) The Virgin Islands.

(6) American Samoa.

(7) The Northern Mariana Islands.

(8) The Trust Territory of the Pacific Islands (Republic of Palau).

(b)(1) If the conditions stated in section 563(a)(3) of the Act apply, the Secretary publishes an alternative distribution of fellowship under this part that:

(i) Will permit fellowship awards at the level stated in § 237.4; and

(ii) Is geographically equitable as determined by the Secretary.

(2) The Secretary sends a notice of this distribution to each of the statewide panels established under § 237.20.

(c)(1) If a State fails to meet the applicable filing deadlines for fellowship recommendations established under this program, the Secretary does not make awards in that State.

(2) In redistributing any returned or unused funds from a State, the Secretary takes into consideration, but is not limited to, the following factors:

(i) The amount of funds available for redistribution.

(ii) The number of States that request additional funds.

(iii) The number of States that are willing to match fellowship funds.

(iv) The requirements in § 237.4(b) relating to minimum awards.

(Authority: 20 U.S.C. 1113b(a))

[52 FR 26466, July 14, 1987, as amended at 54 FR 10966, Mar. 15, 1989]

§ 237.4 In what amounts are fellowships awarded?

(a) *Maximum award.* A fellowship awarded under this part may not exceed the national average salary of public school teachers in the most recent year for which satisfactory data are available, as determined by the Secretary. The Secretary urges statewide panels to award fellowships in the maximum amount.

(b) *Minimum award.* Except as provided in paragraph (c) of this section, a fellowship awarded under this part may not be less than half the national average salary of public school teachers in the most recent year for which satisfactory data are available, as determined by the Secretary.

(c) *Partial award.* If, after awarding one or more fellowships that meet the requirements of paragraphs (a) and (b) of this section, a State has insufficient funds for a maximum or minimum award, the State may make one partial award that may be less than the minimum award.

(Authority: 20 U.S.C. 1113b(a)(2))

[54 FR 10966, Mar. 15, 1989]

§ 237.5 For what purposes may a fellow use an award?

Christa McAuliffe fellows may use fellowships awarded under this part for projects to improve education including:

(a) Sabbaticals for study or research directly associated with objectives of this part, or academic improvement of the fellows.

(b) Consultation with or assistance to LEAs, private schools, or private school systems other than those with which the fellow is employed or associated.

(c) Development of special innovative programs.

(d) Model teacher programs and staff development.

(Authority: 20 U.S.C. 1113b(b))

§ 237.6 What priorities may the Secretary establish?

(a) The Secretary may annually establish, as a priority, one or more of the projects listed in § 237.5.

(b) The Secretary announces any annual priorities in a notice published in the FEDERAL REGISTER.

(Authority: 20 U.S.C. 1113d(a))

§ 237.7 What regulations apply?

The following regulations apply to the Christa McAuliffe Fellowship Program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 77 (Definitions That Apply to Department Regulations).

(b) The regulations in this Part 237.

(Authority: 20 U.S.C. 1113d(a))

§ 237.8 What definitions apply?

(a) The following definitions apply to terms used in this part:

"Act" means the Higher Education Act of 1965, as amended.

"Fellow" means a fellowship recipient under this part.

"Fellowship" means an award made to a person under this part.

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Department
EDGAR
Elementary school
Local educational agency
Private
Public
Secondary school
Secretary
State educational agency

(Authority: 20 U.S.C. 1113d(a))

Subpart B—How Does One Apply For An Award?

§ 237.10 How does an individual apply for a fellowship?

(a) To apply for a fellowship under this part, an individual must submit an application containing a proposal for a fellowship project as described in § 237.5, indicating the extent to which the applicant wishes to continue current teaching duties.

(b) The application shall provide this application to the appropriate LEA for comment prior to submission to the statewide panel for the State within which the proposal project is to be conducted as described in § 237.20.

(c) The applicant shall submit the application to the statewide panel within the deadline established by the panel.

(Authority: 20 U.S.C. 1113c, 1113d(a))

Subpart C—How Are Fellows Selected?

§ 237.20 What are the statewide panels?

(a) Recipients of Christa McAuliffe Fellowships in each State are selected by a seven-member statewide panel appointed by the chief State elected official, acting in consultation with the State educational agency (SEA), or by an existing panel designated by the chief State elected official and approved by the Secretary.

(b) The statewide panel must be representative of school administrators, teachers, parents, and institutions of higher education.

(Authority: 20 U.S.C. 1113c)

§ 237.21 What are the responsibilities of a statewide panel?

(a) Each statewide panel has the responsibility for:

(1) Establishing its own operating procedures regarding the fellowship selection process; and

(2) Disseminating information and application materials to the LEAs, private schools, and private school systems regarding the fellowship competition.

(b) Each panel may impose reasonable administrative requirements for the submission, handling, and processing of applications.

(c) Each statewide panel must consult with the appropriate LEA in evaluating proposals from applicants.

(d) In their applications to the statewide panel, individuals must include:

(1) Two recommendations from teaching peers;

(2) A recommendation from the principal; and

(3) A recommendation from the superintendent on the quality of the proposal and its educational benefit.

(e) A statewide panel may establish additional criteria, consistent with the Act, for the award of fellowships in its area as it considers appropriate.

(f) A statewide panel shall submit to the Secretary its selections for recipients of fellowships under this part within the schedule established by the Secretary.

(Authority: 20 U.S.C. 1113d)

Subpart D—What Conditions Must Be Met By Fellows?

§ 237.30 What is the duration of a fellowship?

An individual may receive a Christa McAuliffe Fellowship under this program for up to 12 months.

(Authority: 20 U.S.C. 1113d(a))

§ 237.31 May a fellowship be awarded for two consecutive years?

A Christa McAuliffe fellow may not receive an award for any two consecutive years.

(Authority: 20 U.S.C. 1113b(a)(2))

§ 237.32 What records and reports are required from fellows?

Each fellow shall keep any records and submit any reports that are required by the Secretary.

(Authority: 20 U.S.C. 1113d(a))

§ 237.33 What is the service requirement for a fellowship?

(a) Except as provided in paragraph (b) of this section, a fellow must return to a teaching position in the fellow's current LEA, private school, or private school system for at least two years following the completion of the fellowship.

(b) In the case of extenuating circumstances (for example, temporary disability), a fellow has a five-year period in which to fulfill the two-year teaching requirement in paragraph (a) of this section.

(Authority: 20 U.S.C. 1113b(a)(2), 1113d)

[54 FR 10966, Mar. 15, 1989]

§ 237.34 What are the requirements for repayment of the fellowship?

(a) If a fellow does not carry out the activities described in the approved application or does not comply with § 237.33, the fellow shall make repayment in accordance with this section.

(b) The Secretary prorates the amount a fellow is required to repay based on the length of time the fellow carried out the fellowship activities, and held a teaching position in accordance with § 237.33 compared to the length of time that would have been involved if the fellow has fully met these requirements.

(Authority: 20 U.S.C. 1113e)

PART 241—LAW-RELATED EDUCATION PROGRAM

Subpart A—General

Sec.
241.1 What is the Law-Related Education Program?
241.2 Who is eligible to apply for a grant under the Law-Related Education Program?
241.3 What regulations apply to the Law-Related Education Program?
241.4 What definitions apply to the Law-Related Education Program?

Subpart B—What Types of Projects Does the Secretary Assist Under This Program?

241.10 What types of projects does the Secretary assist?
241.11 What priorities may the Secretary select?

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make a Grant?

241.30 How does the Secretary evaluate an application?
241.31 What selection criteria does the Secretary use?

Subpart E—What Conditions Must be Met by a Grantee?

241.40 What provisions must be made for participation of private school children?

AUTHORITY: 20 U.S.C. 3851, unless otherwise noted.

Source: 49 FR 23594, June 6, 1984, unless otherwise noted.

Subpart A—General

§ 241.1 What is the Law-Related Education Program?

The Law-Related Education Program is designed to provide persons with knowledge and skills pertaining to the law, the legal process, the legal system, and the fundamental principles and values on which these are based. The purpose of the program is to enable children, youth, and adults to become more informed citizens.

(Authority: 20 U.S.C. 3851)

§ 241.2 Who is eligible to apply for a grant under the Law-Related Education Program?

(a) A State educational agency (SEA), local educational agency (LEA), or other public or nonprofit private agency, organization, or institution may apply for a grant.

(b) An applicant may apply singly or jointly with other eligibility applicants, as provided in 34 CFR 75.127 through 75.129.

(Authority: 20 U.S.C. 3851)

§ 241.3 What regulations apply to the Law-Related Education Program?

The following regulations apply to the Law-Related Education Program:

(a) The Education Department General Administrative Regulations (EDGAR) (34 CFR Parts 74, 75, 77, 78, and 79).

(b) The regulations in this Part 241.

(Authority: 20 U.S.C. 3474)

§ 241.4 What definitions apply to the Law-Related Education Program?

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR Part 77:

Applicant
Application
EDGAR
Elementary school
Local educational agency
Nonprofit
Private
Project
Public
Secondary school
Secretary
State
State educational agency

(b) *Definition that applies to this program.* The following definition applies to the Law-Related Education Program:

"Institutionalization" means the incorporation of law-related education materials and processes—and their adaptation, as appropriate—as an integral part of ongoing system-wide activities using State and local funding sources.

(Authority: 20 U.S.C. 3473(a), 3851)

Subpart B—What Types of Projects Does the Secretary Assist Under THis Program?

§ 241.10 What types of projects does the Secretary assist?

The Secretary may fund applications proposing projects that include, but are not limited to, those designed to:

(a) Support the institutionalization of existing model law-related education programs in elementary and secondary school classrooms;

(b) Provide assistance from established law-related education programs to other State and local educational agencies to enable them to institutionalize successful law-related education programs;

(c) Support projects to develop, test, demonstrate, and disseminate new approaches or techniques in law-related education that can be used or adapted and eventually institutionalized by other agencies and institutions; or

(d) Support one or more contracts for specific activities in law-related education outside of the grant competition under these regulations.

(Authority: 20 U.S.C. 3851)

§ 241.11 What priorities may the Secretary select?

(a) Each year, the Secretary may select for priority one or more of the types of projects listed in § 241.10.

(b) The Secretary may establish limits or requirements for the scope of the service area under one or more of the types of projects under § 241.10, such as State-wide, regional, or national projects.

(c) The Secretary publishes the selected priorities, and limits or requirements for the scope of service areas, if any, in a notice in the FEDERAL REGISTER.

(Authority: 20 U.S.C. 3474(a), 3851)

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make a Grant?

§ 241.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application submitted under this program on the basis of the criteria in § 241.31 of these regulations.

(b) The Secretary awards up to 100 points for the extent to which an application meets these criteria.

(c) The maximum possible points for each complete criterion is indicated in parentheses after the heading for each criterion.

(Approved by the Office of Management and Budget under control number 1880-0507)

(Authority: 20 U.S.C. 3474(a), 3851)

[49 FR 23594, June 6, 1984, as amended at 53 FR 49144, Dec. 6, 1988]

§ 241.31 What selection criteria does the Secretary use?

The Secretary uses the following selection criteria in evaluating each application:

(a) *Institutionalizing law-related education.* (35 points)

The likely success of the project in helping to institutionalize law-related education programs as measured by the extent and quality of activities that contribute to:

(1) An increase in the number of educators and others who are competent in law-related education; and

(2) The development of partnerships among State educational agencies, local educational agencies, and other public and private agencies for the implementation of law-related education programs in the classroom.

(b) *Plan of operation.* (15 points)

(1) The quality of the plan of operation for the project.

(2) The Secretary looks for information that shows:

(i) High quality in the design of the project;

(ii) An effective plan of management that ensures proper and efficient administration of the project;

(iii) A clear description of how the objectives of the project relate to the purpose of the programs;

(iv) The way the applicant plans to use its resources and personnel to achieve each objective; and

(v) A clear description of how the applicant will provide equal access and treatment for eligible project participants who are members of groups that have been traditionally underrepresented, such as:

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(c) *Quality of key personnel.* (15 *points*)

(1) The quality of the key personnel the applicant plans to use in the project.

(2) The Secretary looks for information that shows:

(i) The qualifications of the project director (if one is to be used);

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (c)(2) (i) and (ii) of this section plans to commit to the project; and

(iv) The extent to which the applicant, as part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally underrepresented, such as:

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(3) To determine the qualifications of a person, the Secretary considers evidence of past experience and training in the fields related to the objectives of the project, as well as other information that the applicant provides.

(d) *Quality of project.* (15 points)

The likely quality of the project as measured by the following:

(1) Evidence of applicability to classroom use and age-level of students of the applicant's materials, programs, or approaches in law-related education.

(2) The applicant's and the staff's experience in and knowledge of law-related education.

(3) How the project addresses a diversity of learning approaches that are:

(i) Appropriate to the students to whom the project is directed;

(ii) Designed to address gains not only in students' knowledge, but also in their skills; and

(iii) Balanced and based on sound scholarship and do not advocate particular legal or political viewpoints.

(4) The involvement of the appropriate State educational agency or agencies in the planning and conduct of the project.

(e) *Budget and cost effectiveness.* (8 points)

(1) The extent to which the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows:

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (7 points)

(1) The quality of the evaluation plan for the project. (See 34 CFR 75.590—Evaluation by the grantee.)

(2) The Secretary looks for information that shows methods of evaluation that are appropriate for the project and, to the extent possible, are objective and quantifiable.

(g) *Adequacy of resources.* (5 points)

(1) The extent to which the applicant plans to devote adequate resources to the project.

(2) The Secretary looks for information that shows:

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(Approved by the Office of Management and Budget under control number 1880-0507)

(Authority: 20 U.S.C. 3474, 3851)

[49 FR 23594, June 6, 1984, as amended at 53 FR 49144, Dec. 6, 1988]

Subpart E—What Conditions Must be Met by a Grantee?

§ 241.40 What provisions must be made for participation of private school children?

An LEA that receives a grant under this programs must provide for the equitable participation of private school children in the project, in accordance with Section 586 of the Education Consolidation and Improvement Act of 1981.

(Authority: 20 U.S.C. 3862)

PART 245—WOMEN'S EDUCATIONAL EQUITY ACT PROGRAM—GENERAL PROVISIONS

Subpart A—General

Sec.

245.1 What is the Women's Educational Equity Act Program?
245.2 Who is eligible for an award?
245.3 Are men and boys eligible to participate in projects and activities?
245.4 What regulations apply?
245.5 What definitions apply?

Subpart B—What Kinds of Projects and Activities May the Secretary Fund?

245.10 What kinds of projects may the Secretary fund?
245.11 What kinds of activities may the Secretary fund?
245.12 How does the Secretary establish priorities?

Subpart C—How Does One Apply for an Award?

245.20 How must a local educational agency satisfy the requirement for an open meeting certification?
245.21 What assurance must an application include?

Subpart D—What Conditions Must Be Met by a Recipient?

245.40 What costs are allowed?
245.41 What cost principles apply to individuals?

AUTHORITY: 20 U.S.C. 3041-3045, unless otherwise noted.

SOURCE: 54 FR 37877, Sept. 13, 1989, unless otherwise noted.

Subpart A—General

§ 245.1 What is the Women's Educational Equity Act Program?

(a) The Women's Educational Equity Act Program provides funds for projects designed to do one or more of the following:

(1) Promote educational equity for women in the United States.

(2) Promote educational equity for women who suffer multiple discrimination, bias, or stereotyping based on—

(i) Sex; and

(ii) Race, ethnic origin, disability, or age.

(3) Enable educational agencies and institutions to meet the requirements of Title IX of the Education Amendments of 1972 (relating to nondiscrimination on the basis of sex in federally assisted educational programs).

(b) Unless otherwise specified, as used in this part—and in 34 CFR Parts 246 and 247—the term "women" includes girls.

(c) The Secretary may provide funds under this program in the form of a grant or contract.

(Authority: 20 U.S.C. 3041(b), 3042(a))

§ 245.2 Who is eligible for an award?

The following are eligible to receive awards under the Women's Educational Equity Act Program:

(a) Public agencies, institutions, and organizations.

(b) Nonprofit private agencies, institutions, and organizations, including student and community groups.

(c) Individuals.

(Authority: 20 U.S.C. 3042(a))

§ 245.3 Are men and boys eligible to participate in projects and activities?

Nothing in this part or in 34 CFR Parts 246 or 247 prohibits men and boys from participating in any project or activity assisted under the Women's Educational Equity Act Program.

(Authority: 20 U.S.C. 3043(c))

§ 245.4 What regulations apply?

The following regulations apply to the Women's Educational Equity Act Program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of Grants to Institutions of Higher Education, Hospitals and Nonprofit Organizations); 34 CFR Part 75 (Direct Grant Programs); 34 CFR Part 77 (Definitions that Apply to Department Regulations); 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities); 34 CFR Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments); 34 CFR Part 81 (General Education Provisions Act—Enforcement); and 34 CFR Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(b) The Federal Acquisition Regulation (FAR) in 48 CFR Chapter 1 and the Department of Education Acquisition Regulation (EDAR) in 48 CFR Chapter 34.

(c) The regulations in 34 CFR Parts 246 and 247, as appropriate.

(d) The regulations in this Part 245.

(Authority: 20 U.S.C. 3041-3045)

§ 245.5 What definitions apply?

The following terms used in this part are defined in 34 CFR 77.1:

Applicant
Application
Award
Budget
Contract
EDGAR
Grant
Local educational agency
Nonprofit
Private
Project
Public
Secretary
State

(b) *Other definitions.* The following definitions also apply to this part:

Act means the Women's Educational Equity Act, as amended.

Educational equity for women means—

(1) The elimination of institutionalized barriers and inequitable educational policies and practices that prevent full and fair participation by women in educational programs and in American society generally; and

(2) The ability of women to choose freely among benefits and opportunities in educational institutions, programs and curricula, without limitations based on sex.

Title IX means Title IX of the Education Amendments of 1972 (Pub. L. 92-318).

(Authority: 20 U.S.C. 3041-3045)

Subpart B—What Kinds of Projects and Activities May the Secretary Fund?

§ 245.10 What kinds of projects may the Secretary fund?

(a) The Secretary provides Federal funds for projects of general significance (34 CFR Part 246).

(b) If funds appropriated for the Women's Educational Equity Act Program exceed an amount specified in 20 U.S.C. 3042(b), the Secretary may also provide funds for projects of local significance (34 CFR Part 247).

(Authority: 20 U.S.C. 3042)

§ 245.11 What kinds of activities may the Secretary fund?

(a) The Secretary awards at least one grant or contract each fiscal year for the performance of each of the activities described in paragraph (c) of this section.

(b) The Secretary awards funds for demonstration, developmental, and dissemination activities designed to provide, advance, ensure, or achieve educational equity for women at all levels of education.

(c) Activities described in paragraph (b) of this section may include, but are not restricted to, the following:

(1) Development—if materials are commercially unavailable—and evaluation of curricula, textbooks, and other educational materials.

(2) Model training programs for educational personnel.

(3) Research and development projects.

(4) Guidance and counseling activities, including the development of nondiscriminatory tests.

(5)(i) Educational activities to increase opportunities for adult women, including continuing educational activities and programs for underemployed and unemployed women.

(ii) As used in paragraph (c)(5)(i) of this section, "adult" refers to women who—

(A) Have attained the age of 16; and

(B) Are no longer in school.

(6) Expansion and improvement of educational programs and activities for women in vocational education, career education, physical education, and educational administration.

(Authority: 20 U.S.C. 3042(a))

[54 FR 37877, Sept. 13, 1989; 55 FR 7711, Mar. 5, 1990]

§ 245.12 How does the Secretary establish priorities?

(a) Each year, in a notice published in the FEDERAL REGISTER, the Secretary establishes separate priorities for projects of general significance and projects of local significance. The Secretary selects one or more priorities for each category of projects, from among the following:

(1) The priorities in § 246.11.

(2) The priorities in § 247.11.

(b)(1) Applicants may submit applications under one or more of the selected priorities. Applicants must identify in their applications the priorities under which they wish to compete.

(2) Applications under a priority compete against other applications under that priority for funds allocated to the priority.

(c)(1) An applicant may propose a project that is not under a priority, but is within the scope of the authorized activities described in § 245.11. These applications compete for funds not allocated to any priority.

(2) If an applicant fails to identify a priority, the application competes with other applications that are not under a selected priority.

(d)(1) Each year the Secretary may select one or more of the priorities established for general grants to apply to challenge grants.

(2) In any year that the Secretary establishes priorities for challenge grants, the procedures in paragraphs (a) through (c) of this section apply.

(Authority: 20 U.S.C. 3045)

Subpart C—How Does One Apply for an Award?

§ 245.20 How must a local educational agency satisfy the requirement for an open meeting certification?

An applicant that is a local educational agency shall—

(a) Give reasonable notice of the general public's opportunity to testify or otherwise comment at an open meeting regarding the subject matter of the application;

(b) Hold the open meeting;

(c) Consider comments obtained at the meeting in developing the final application; and

(d) Certify in the application submitted to the Secretary that the LEA has held an open meeting regarding the application, as required by this section.

(Authority: 20 U.S.C. 3386)

§ 245.21 What assurance must an application include?

In addition to meeting the other requirements in this part, and as appropriate, Parts 246 and 247, an application must include an assurance that the applicant, if selected for an award, would administer or supervise the project or activity for which the applicant seeks Federal financial assistance under the program.

(Authority: 20 U.S.C. 3043(a))

Subpart D—What Conditions Must be Met by a Recipient?

§ 245.40 What costs are allowed?

In addition to the costs allowed in EDGAR, the Secretary allows project funds to be used for the following:

(a) The payment of stipends, travel costs, and child care to persons who participate in training under the project and to persons who participate in field-testing of materials and programs developed under the project if—

(1) Provision for these payments was included in the application;

(2) The applicant demonstrates to the Secretary's satisfaction that the payments are necessary to achieve the objectives of the project; and

(3) Participants who receive stipends are not otherwise paid for the time during which they participate in the training or testing.

(b) The costs of tuition and fees for participants in a training activity under the project if—

(1) Provision for these costs was included in the application; and

(2) The applicant demonstrates to the Secretary's satisfaction that payment of the costs is necessary to achieve the objectives of the project.

(Authority: 20 U.S.C. 3042(a))

§ 245.41 What cost principles apply to individuals?

The cost principles referenced in 34 CFR 80.22 (Allowable Costs) apply to an individual who receives a grant under this program, except that an individual may not use an indirect cost rate.

(Authority: 20 U.S.C. 3042(a))

PART 246—WOMEN'S EDUCATIONAL EQUITY ACT PROGRAM—PROJECTS OF GENERAL SIGNIFICANCE

Subpart A—General

Sec.

246.1 What are projects of general significance under the Women's Educational Equity Act Program.
246.2 Who is eligible for an award?
246.3 What regulations apply?

56Subpart B—What Kinds of Projects and Activities May the Secretary Fund?

246.10 What kinds of projects and activities may the Secretary fund?
246.11 What priorities may the Secretary select?

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make an Award?

246.30 How does the Secretary evaluate an application?

246.31 Selection criterion: Need.

246.32 Selection criterion: Impact.

246.33 Selection criterion: Plan of operation.

246.34 Selection criterion: Qualifications of staff.

246.35 Selection criterion: Innovative approach.

246.36 What additional factors does the Secretary consider in selecting projects for funding?

Authority: 20 U.S.C. 3041-3045, unless otherwise noted.

Source: 54 FR 37876, Sept. 13, 1989, unless otherwise noted.

Subpart A—General

§ 246.1 What are projects of general significance under the Women's Educational Equity Act Program?

Under the Women's Educational Equity Act Program—Projects of General Significance, the Secretary provides Federal funds to projects—

(a) That address one or more purposes of the Act;

(b) That will—

(1) Have national or statewide significance; or

(2) Be of significance to women generally; and

(c) Whose potential impact is not confined to a local area.

(Authority: 20 U.S.C. 3042(a)(1))

§ 246.2 Who is eligible for an award?

(a) The types of entities listed in 34 CFR 245.2 are eligible to receive awards under the Women's Educational Equity Act Program—Projects of General Significance.

(b) In addition to the types of entities referred to in paragraph (a) of this section, a consortium of these entities is eligible to receive a challenge grant.

(Authority: 20 U.S.C. 3042(a); 3044(b))

§ 246.3 What regulations apply?

The following regulations apply to the Women's Educational Equity Act Program—Projects of General Significance:

(a) The regulations in 34 CFR Part 245.

(b) The regulations in this Part 246.

(Authority: 20 U.S.C. 3041-3045)

Subpart B—What Kinds of Projects and Activities May the Secretary Fund?

§ 246.10 What kinds of projects and activities may the Secretary fund?

Under the Women's Educational Equity Act Program—Projects of General Significance, the Secretary provides Federal funds for the following kinds of activities:

(a) *General grants or contracts.* The Secretary may provide assistance through a general grant or award a contract for one or more of the kinds of activities described or listed in 34 CFR 245.11.

(b)(1) *Challenge grants.* The Secretary may provide assistance through a challenge grant for projects designed to develop innovative approaches to achieving the purposes of the Act.

(2) These approaches may include, but are not restricted to the following:

(i) Comprehensive plans for implementation of equity programs at every educational level.

(ii) Innovative approaches to school-community partnerships.

(iii) New dissemination and replication strategies.

(Authority: 20 U.S.C. 3042, 3044(a))

§ 246.11 What priorities may the Secretary select?

In establishing priorities for funding each year according to 34 CFR 245.12, the Secretary may select one or more of the following:

(a) Projects to develop and test model programs and materials that could be used by local educational agencies and other entities in meeting the requirements of Title IX.

(b) Projects to develop new educational programs, training programs, counseling programs, or other programs, designed to increase the interest and participation of women in instructional courses in mathematics, science, and computer science.

(c) Projects to develop new educational programs, training programs, counseling programs, or other programs, or to expand existing model programs, designed to accomplish the following:

(1) Reduce the rate at which women drop out of formal education.

(2) Encourage women dropouts to resume their education.

(d) Projects to develop or expand guidance and counseling programs designed to increase the knowledge and awareness of women regarding opportunities in careers in which women have not significantly participated.

(e) Projects to develop new educational programs or expand existing model educational programs designed to enhance opportunities for educational achievement by economically disadvantaged women.

(f) Projects to develop new educational programs or expand existing model educational programs designed to enhance opportunities for educational achievement by women who suffer multiple discrimination on the basis of sex and race, ethnic origin, age, or disability.

(Authority: 20 U.S.C. 3045)

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make an Award?

§ 246.30 How does the Secretary evaluate an application?

(a)(1) The Secretary evaluates an application on the basis of the criteria in §§ 246.31 through 246.34.

(2) The Secretary awards up to 100 points for these criteria.

(b)(1) In the case of an application for a challenge grant under 34 CFR Part 246, the Secretary also applies the criterion in 34 CFR 246.35.

(2) The Secretary awards up to five additional points for this criterion.

(c) The maximum possible score for each criterion is indicated in parentheses.

(Authority: 20 U.S.C. 3045)

§ 246.31 Selection criterion: Need.

The Secretary determines the extent to which—

(a) The proposed project addresses a need or needs that—

(1) Are central to one or more of the purposes of the Act; (8 points) and

(2) Have magnitude and significance; (8 points) and

(b) The applicant has sufficient knowledge of other projects dealing with this need or these needs, and demonstrates convincingly that the proposed project would not duplicate the other projects. (4 points)

(Authority: 20 U.S.C. 3045)

§ 246.32 Selection criterion: Impact.

The Secretary determines the degree to which the project is of general significance, as evidenced by the extent to which—

(a) The objectives of the proposed project are realistic; (6 points)

(b) The strategy and activities proposed to implement the project are likely to accomplish the project's objectives; (6 points)

(c) The proposed project holds promise of making a substantial contribution toward attaining one or more of the purposes of the Act; (6 points) and

(d) The applicant demonstrates that the project will address or can be adapted to address the educational equity needs of racial and ethnic minority group women, disabled women and older women. (6 points)

(Authority: 20 U.S.C. 3043, 3045)

§ 246.33 Selection criterion: Plan of operation.

The Secretary determines the extent to which—

(a) The management plan proposed by the applicant—

(1) Is likely to be effective for implementing the proposed project and achieving the project's objectives; (10 points)

(2) Provides for adequate and appropriate allocation of resources; (5 points) and

(3) Contains realistic schedules; (5 points)

(b) The budget proposed by the applicant is adequate and provides for costs that are reasonable in relation to the objectives of the project; (10 points) and

(c) The policies and procedures provided by the applicant for evaluating the proposed project are likely to ensure adequate evaluation including, if appropriate, an evaluation or estimate of the potential for continued significance following completion of the grant period. (10 points)

(Authority: 20 U.S.C. 3043, 3045)

§ 246.34 Selection criterion: Qualifications of staff.

The Secretary determines the extent to which—

(a) The director of the proposed project has the qualifications and capability to conduct the project successfully; (5 points)

(b) The staff of the project has the qualifications and capability to implement and operate the project successfully; (5 points)

(c) The time to be spent on the project by the director and staff is sufficient to carry out the project activities. (3 points) and

(d) The applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapping conditions. (3 points)

(Authority: 20 U.S.C. 3045)

§ 246.35 Selection criterion: Innovative approach.

The Secretary determines the extent to which the proposed project uses a new or untried approach to achieving some aspect of educational equity for women.

(Authority: 20 U.S.C. 3044, 3045)

§ 246.36 What additional factors does the Secretary consider in selecting projects for funding?

(a) In addition to the criteria in §§ 246.31 through 246.34—and, if appropriate, the criterion in § 246.35—the Secretary, in selecting projects for funding, gives special consideration to—

(1) Applications submitted by applicants that have not received assistance under this part or Part C of Title IX of the Elementary and Secondary Education Act of 1965; and

(2) The geographical distribution of awards.

(b) The Secretary awards ten additional points to each project that is eligible for consideration under paragraph (a)(1) of this section.

(Authority: 20 U.S.C. 3043(b); 3045)

PART 247—WOMEN'S EDUCATIONAL EQUITY ACT PROGRAM—PROJECTS OF LOCAL SIGNIFICANCE

Subpart A—General

Sec.
247.1 What are projects of local significance under the Women's Educational Equity Act Program?
247.2 Who is eligible for an award?
247.3 What regulations apply?

Subpart B—What Kinds of Activities May the Secretary Fund?

247.10 What kinds of activities may the Secretary fund?
247.11 What priorities may the Secretary select?

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make an Award?

247.30 How does the Secretary evaluate an application?
247.31 Selection criterion: Need.
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247.33 Selection criterion: Plan of operation.
247.34 Selection criterion: Qualification of staff.
247.35 Selection criterion: Cooperation and commitment.
247.36 Selection criterion: Budget and cost effectiveness.
247.37 Selection criterion: Evaluation.
247.38 What is the maximum period of an award?

Subpart E—What Conditions Must Be Met by a Recipient?

247.40 What portion of the costs must a recipient contribute?

AUTHORITY: 20 U.S.C. 3041-3045, unless otherwise noted.

SOURCE: 54 FR 37878, Sept. 13, 1989, unless otherwise noted.

Subpart A—General

§ 247.1 What are projects of local significance under the Women's Educational Equity Act Program?

Under the Women's Educational Equity Act Program—Projects of Local Significance, the Secretary provides Federal funds to pay a portion of the costs of establishing and operating special programs and projects of local significance that provide equal opportunities for both sexes.

(Authority: 20 U.S.C. 3042(a)(2))

§ 247.2 Who is eligible for an award?

(a) The types of entities listed in 34 CFR 245.2 are eligible to receive awards under the Women's Educational Equity Act Program—Projects of Local Significance.

(b) Each year the Secretary allocates at least 75 percent of the funds available for these types of projects for awards to local educational agencies (LEAs).

(Authority: 20 U.S.C. 3042(a)(2))

§ 247.3 What regulations apply?

The following regulations apply to the Women's Educational Equity Act Program—Projects of Local Significance:

(a) The regulations in 34 CFR Part 245.

(b) The regulations in this Part 247.

(Authority: 20 U.S.C. 3041-3045)

Subpart B—What Kinds of Activities May the Secretary Fund?

§ 247.10 What kinds of activities may the Secretary fund?

Under the Women's Educational Equity Act Program—Projects of Local Significance, the Secretary provides Federal funds for the following kinds of activities:

(a) The kinds of activities described or listed in 34 CFR 245.11.

(b) Activities incident to achieving compliance with Title IX.

(c) Other special activities designed to achieve the purposes of the Act.

(Authority: 20 U.S.C. 3042(a)(2))

§ 247.11 What priorities may the Secretary select?

In establishing priorities for funding each year, according to 34 CFR 245.12, the Secretary may select one or more of the following:

(a) Projects to help LEAs and other educational agencies and institutions meet the requirements of Title IX.

(b) Projects to develop—if materials are commercially unavailable—and adapt to local needs, curricula, textbooks, and other educational materials that will promote educational equity.

(c) Projects to develop and implement training programs, counseling programs, or other programs designed to enhance the skills of women in mathematics, science, and computer science.

(d) Projects to develop and implement guidance and counseling programs designed to—

(1) Increase the knowledge and awareness of women regarding nontraditional career options and opportunities for women; and

(2) Provide information on educational and other requirements for women entering those careers.

(Authority: 20 U.S.C. 3045)

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make an Award?

§ 247.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application for Federal financial assistance for a project of local significance on the basis of the criteria in §§ 247.31 through 247.37.

(b) The Secretary awards up to 100 points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

(Authority: 20 U.S.C. 3045)

§ 247.31 Selection criterion: Need.

The Secretary determines the extent to which—

(a) The proposed project addresses needs that are central to the purposes of the Act; (5 points) and

(b) The applicant documents that there are severe and significant needs to be addressed in the local community, agency, or institution to be served. (5 points)

(Authority: 20 U.S.C. 3045)

§ 247.32 Selection criterion: Impact.

The Secretary determines the extent to which—

(a) The project will help educational agencies or institutions meet the requirements of Title IX or otherwise provide educational equity in the local community, agency or institution to be served; (5 points) and

(b) The project will increase the knowledge and commitment of administration, faculty, staff, students, parents, and the public to the needs and issues addressed by the project. (5 points)

(Authority: 20 U.S.C. 3045)

§ 247.33 Selection criterion: Plan of operation.

The Secretary determines the extent to which—

(a) The project's objectives are clear and related to the needs identified in the application; (8 points)

(b) The applicant's strategies and activities are feasible and are likely to address the identified needs successfully; (8 points)

(c) The applicant has an effective management plan that ensures proper management and administration of the project, including realistic schedules and adequate allocation of resources and personnel to achieve each objective; (8 points) and

(d) The applicant demonstrates how it will provide equal access and treatment for eligible project participants who are members of groups that suffer multiple discrimination, bias, or stereotyping based on sex and race, ethnic origin, age, or disability. (8 points)

(Authority: 20 U.S.C. 3045)

§ 247.34 Selection criterion: Qualifications of staff.

The Secretary determines the extent to which—

(a) The project director and staff have the qualifications and the capability to conduct the project successfully; (10 points)

(b) The time to be spent on the project by the director and staff is sufficient to carry out project activities; (5 points) and

(c) The applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapping conditions. (5 points)

(Authority: 20 U.S.C. 3045)

§ 247.35 Selection criterion: Cooperation and commitment.

The Secretary determines the extent to which—

(a) There is involvement and cooperation in the planning and implementation of the project by appropriate community groups, such as parent-teacher groups, that could contribute to the project's success; (3 points)

(b) There is support for the project and commitment to the success of the project by the top administration of the applicant; (3 points)

(c) The project's activities and management of those activities will be centrally placed in the agency or institution and will be an integral part of the agency's or institution's ongoing activities; (3 points) and

(d) The applicant plans to incorporate the proposed project into the permanent policies and practices of the agency or institution following completion of the grant period. (3 points)

(Authority: 20 U.S.C. 3045)

§ 247.36 Selection criterion: Budget and cost effectiveness.

The Secretary determines the extent to which the budget for the project is adequate to support the project activities. (8 points)

(Authority: 20 U.S.C. 3045)

§ 247.37 Selection criterion: Evaluation.

The Secretary determines the extent to which—

(a) The policies and procedures provided by the applicant for evaluating the proposed project are likely to ensure adequate evaluation including, if appropriate, an evaluation or estimate of the potential for continued significance following completion of the grant period; (4 points) and

(b) The methods of evaluation, to the extent possible, are objective and produce data that are quantifiable. (4 points)

(Authority: 20 U.S.C. 3043, 3045)

§ 247.38 What is the maximum period of an award?

A project of local significance may receive Federal funds for a period that does not exceed two years.

(Authority: 20 U.S.C. 3042(a)(2))

Subpart E—What Conditions Must Be Met by a Recipient?

§ 247.40 What portion of the costs must a recipient contribute?

(a) If selected for funding under the Women's Educational Equity Act Program—Projects of Local Significance, an LEA shall contribute the following share of approved costs:

(1) In the first year of the project, 20 percent.

(2) In the second year of the project, if applicable, 40 percent.

(b) If selected for funding under the Women's Educational Equity Act Program—Projects of Local Significance, an entity other than an LEA shall contribute the following share of approved costs:

(1) In the first year of the project, 10 percent.

(2) In the second year of the project, if applicable, 20 percent.

(Authority: 20 U.S.C. 3042(a)(2)).

PART 250—INDIAN EDUCATION ACT—GENERAL PROVISIONS

Subpart A—General

Sec.

250.1 What programs are governed by these regulations?
250.2 [Reserved]
250.3 What regulations apply to these programs?
250.4 What definitions apply to these programs?
250.5 What provisions of the Indian Self-Determination and Education Assistance Act apply to these programs?

Subpart B—[Reserved]

Subpart C—How Does One Apply for a Grant?

250.20 How does an applicant apply under a particular program?

AUTHORITY: 25 U.S.C. 2601-2651, unless otherwise noted.

Subpart A—General

§ 250.1 What programs are governed by these regulations?

The regulations in this part apply to all programs conducted under the Indian Education Act except the Indian Fellowship Program (34 CFR Part 263). Programs governed by these regulations and their applicable program regulations are as follows:

(a) Formula Grants—Local Education Agencies (34 CFR Part 251).

(Authority: 25 U.S.C. 2601-2606)

(b) Indian-Controlled Schools–Enrichment Projects (34 CFR Part 252).

(Authority: 25 U.S.C. 2602(c))

(c) Educational Services for Indian Children (34 CFR Part 253).

(Authority: 25 U.S.C. 2621(a), (c))

(d) Planning, Pilot, and Demonstration Projects for Indian Children (34 CFR Part 254).

(Authority: 25 U.S.C. 2621(a), (b))

(e) Gifted and Talented Program (34 CFR Part 255).

(Authority: 25 U.S.C. 2624(c))

(f) Educational Personnel Development (34 CFR 256).

(Authority: 25 U.S.C. 2621(d), 2622)

(g) Educational Services for Indian Adults (34 CFR Part 257).

(Authority: 25 U.S.C. 2631(b))

(h) Planning, Pilot, and Demonstration Projects for Indian Adults (34 CFR Part 258).

(Authority: 25 U.S.C. 2631(a))

[54 FR 20481, May 11, 1989]

§ 250.2 [Reserved]

§ 250.3 What regulations apply to these programs?

In addition to the regulations contained in this part and the applicable program regulations, the programs under 34 CFR Parts 251 through 258 are subject to the Education Department General Administrative Regulations (EDGAR) in:

(a) 34 CFR Part 74 (Administration of Grants);

(b) 34 CFR Part 75 (Direct Grant Programs), except for § 75.590(c) relating to a grantee's project evaluation;

(c) 34 CFR Part 77 (Definitions);

(d) 34 CFR Part 78 (Education Appeal Board); and

(e) 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities), except that Part 79 does not apply to 34 CFR Parts 252, 255, and 256.

(Authority: 25 U.S.C. 2601-2651)

[49 FR 23761, June 7, 1984, as amended at 54 FR 20481, May 11, 1989]

§ 250.4 What definitions apply to these programs?

(a) *Definitions in EDGAR.* Except as otherwise provided, the following terms used in this part and in 34 CFR Parts 251 through 258 are defined in 34 CFR Part 77:

Applicant
Application
Award
Budget period
EDGAR
Elementary school
Facilities
Fiscal year
Grant
Grantee
Grant period
Local government
Minor remodeling
Nonprofit
Private
Project
Project period
Public
Secondary school
Secretary
State
State educational agency (SEA)
Supplies

(b) *Definitions that apply to the programs governed by this part.*

Unless otherwise provided, the following definitions apply to this part and to 34 CFR Parts 251 through 258:

Adult means any individual who is sixteen years old or older, or who is beyond the age of compulsory school attendance under State Law.

Adult education means instruction or services below college level for adults who are not enrolled in a secondary school and who do not have—

(1) The basic skills to enable them to function effectively in society; or

(2) A certificate of graduation from a school providing secondary education, and who have not achieved an equivalent level of education.

Ancillary educational personnel

(1) This term means guidance counselors, librarians, and others who assist in meeting the educational needs of Indian students.

(2) The term does not include persons in positions not directly involved in the educational process, such as clerks or cafeteria personnel.

Bureau school means an elementary or secondary day or boarding school operated by the Bureau of Indian Affairs (BIA) of the Department of the Interior.

Bureau-funded school means a Bureau school or an elementary or secondary school that receives Pub. L. 93-638 (Indian Self-Determination and Education Assistance Act) contract funds or assistance under the Tribally Controlled Schools Act of 1988 from the Bureau of Indian Affairs.

Child means an individual within the age limits for which the applicable State provides a free public education.

Demonstration project means a project that affords opportunities to examine in practice, and to assess the qualities of, an educational method, approach, or technique for the purpose of adaptation of that method, approach, or technique by other institutions with similar needs.

Equipment means:

(1) Machinery, utilities, and built-in apparatus;

(2) Any enclosure or structure necessary to house the items listed in paragraph (1) of this definition; and

(3) Any other item necessary for the functioning of a facility for the provisions of educational services, including items such as:

(i) Instructional apparatus and necessary furniture;

(ii) Printed, published, and audiovisual instructional materials; and

(iii) Books, periodicals, documents, and related materials.

Free public education except as defined in 34 CFR 251.32, means education that is:

(1) Provided at public expense, under public supervision and direction, without tuition charge; and

(2) Provided as elementary or secondary school education in the applicable State.

Full-time student means an individual pursuing studies that constitute a full-time workload in accordance with an institution's established policy.

Gifted and talented students means children and youth who give evidence of high performance capability in areas such as intellectual, creative, artistic, or leadership capacity or in specific academic fields, and who require services or activities not ordinarily provided by the school in order to develop such capabilities fully.

Handicapped person means an individual requiring special education and related services because he or she:

(1) Is mentally retarded, hard-of-hearing, deaf, speech-impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health-impaired; or

(2) Has a specific learning disability.

Indian—except as noted in § 250.5(b)—means an individual who is:

(1) A member (as defined by an Indian tribe, band, or other organized group) of such Indian tribe, band, or other organized group of Indians, including those Indian tribes, bands, or groups terminated since 1940 and those recognized by the State in which they reside;

(2) A descendant, in the first or second degree, of an individual described in paragraph (1) of this definition;

(3) Considered by the Secretary of the Interior to be an Indian for any purpose; or

(4) An eskimo or Aleut or other Alaska Native.

Indian institution means a preschool, elementary, secondary, or postsecondary school that:

(1) Is established for the education of Indians;

(2) Is controlled by a governing board, the majority of which is Indian; and

(3) If located on an Indian reservation, operates with the sanction or by charter of the governing body of that reservation.

Indian organization means an organization that:

(1) Is legally established:

(i) By tribal or inter-tribal charter or in accordance with State or tribal law; and

(ii) With appropriate constitution, by-laws, or articles of incorporation;

(2) Has as its primary purpose the promotion of the educational, economic, or social self-sufficiency of Indians;

(3) Is controlled by a governing board, the majority of which is Indian;

(4) If located on an Indian reservation, operates with the sanction or by charter of the governing body of that reservation;

(5) Is neither an organization or subdivision of, nor under the direct control of, any institution of higher education; and

(6) Is not an agency of State or local government.

Indian tribe means any federally or State-recognized Indian tribe, band, nation, rancheria, pueblo, Alaska Native village, or regional or village corporation as defined in or established under the Alaska Native Claims Settlement Act (85 Stat. 688), that exercises the power of self-government.

Institution of higher education means, in any State, an educational institution that:

(1) Admits as a regular student only an individual having a high school graduation certificate or the recognized equivalent of a high school graduation certificate;

(2) Is legally authorized within that State to provide a program of education beyond high school;

(3) Provides:

(i) An educational program for which it awards a bachelor's degree;

(ii) An educational program of not less than two years that is acceptable for full credit toward a bachelor's degree; or

(iii) A two-year program in engineering, mathematics, or the physical or biological sciences that is designed to prepare a student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields that require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(4) Is a public or other nonprofit institution; and

(5)(i)(A) Is accredited by a nationally recognized accrediting agency or association listed by the Secretary; or

(B) If not accredited, is an institution whose credits are accepted, on transfer, by not fewer than three institutions that are accredited, on the same basis as if transferred from an institution that is accredited.

(ii) However, in the case of an institution described in paragraph (3)(iii) of this definition, if the Secretary determines that there is no nationally recognized accrediting agency or association qualified to accredit that type of institution:

(A) The Secretary appoints an advisory committee composed of persons specially qualified to evaluate training provided by that type of institution; and

(B) The advisory committee prescribes the standards of content, scope, and quality that must be met in order to qualify that type of institution to participate under the appropriate program and determines whether particular institutions meet those standards.

(iii) For the purpose of paragraph (5) of this definition, the Secretary publishes a list of nationally recognized accrediting agencies or associations that the Secretary determines to be reliable authority as to the quality of education or training offered.

Local educational agency (LEA) means—

(1) A public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary of secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties recognized in a State as an administrative agency for its public elementary or secondary schools. The term includes includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(2) As used in 34 CFR Part 251 the term also includes tribal schools and Bureau schools.

Parent

(1) Includes a legal guardian or other individual standing *in loco parentis* (in the place of the parent) other than by virtue of being a school administrator or official. Examples of individuals who may stand *in loco parentis* with respect to a child are—

(i) A foster parent of the child; and

(ii) A grandparent with whom the child resides.

(2) In determining whether an individual stands *in loco parentis* with respect to a child, an LEA may consider such factors as:

(i) The current relationship of the child and the natural parent(s);

(ii) The length and stability of the relationship between the individual and the child;

(iii) Tribal custom and tribal law;

(iv) Applicable State law, whether legislative or judicial; and

(v) Dependency for purposes of State of Federal income taxes.

Pilot project means a project that tests an educational method, approach, or technique in a limited and controlled setting to determine:

(1) Whether the educational method, approach, or technique meets an established need; and

(2) Whether the educational objectives of the educational method, approach, or technique are appropriate for Indian children or adults.

Planning project means a project that:

(1) Establishes educational objectives; and

(2) Proposes activities and resources that would be needed to meet these objectives for the education of Indian children or adults.

Secondary school, as used in 34 CFR Parts 254, 255, and 256, means a day or residential school that provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

State, as used in 34 CFR Parts 251, 252, and 253, means any of the 50 States, Puerto Rico, Wake Island, Guam, the District of Columbia, American Samoa, or the Virgin Islands.

Stipend means an allowance for personal living expenses paid to a participant in a personnel development project.

Teacher aide

(1) This term means a person who assists a teacher in the performance of the teacher's teaching or administrative duties.

(2) The term does not include persons in positions not directly involved in the educational process, such as clerks or cafeteria personnel.

Tribal school means any school operated by an Indian tribe, or an organization controlled or sanctioned by an Indian tribal government for the children of that tribe if the school either—

(1) Provides its students an educational program that meets the standards established by the Secretary of the Interior in accordance with the Indian Self-Determination and Education Assistance Act; or

(2) Is operated by that tribe or organization under a contract with the Department of the Interior in accordance with the Indian Self-Determination and Education Assistance Act.

(Authority: 25 U.S.C. 2601-2651)

(Authority: 20 U.S.C. 241aa-241ff, 244, 881, 1202, 1211a, 1221h(a), 3381, 3385, 3385a)

[49 FR 23761, June 7, 1984, as amended at 52 FR 28232, July 28, 1987; 54 FR 20481, May 11, 1989]

§ 250.5 What provisions of the Indian Self-Determination and Education Assistance Act apply to these programs?

(a) Awards under programs covered by this part that are primarily for the benefit of Indians are subject to the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638). That section requires that, to the greatest extent feasible, a grantee:

(1) Give to Indians preferences and opportunities for training and employment in connection with the administration of the grant; and

(2) Give to Indian organizations and to Indian-owned economic enterprises—as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452(e))—preference in the award of contracts in connection with the administration of the grant.

(Authority: Pub. L. 93-638, Section 7(b); 25 U.S.C. 450e(b))

(b) For purposes of this section, an "Indian" is a member of any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established under the Alaska Native Claims Settlement Act (85 Stat. 688), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(Authority: 25 U.S.C. 450 (b), (d), (e))

[49 FR 23761, June 7, 1984, as amended at 54 FR 20481, May 11, 1989]

Subpart B—[Reserved]

Subpart C—How Does One Apply for a Grant?

§ 250.20 How does an applicant apply under a particular program?

(a) An applicant shall specify in its application the particular program under 34 CFR Parts 251 through 256 under which it is applying.

(b) If the applicant submits an application under a program covered by this part and the project proposed by the applicant is not authorized under that program, the Secretary may, with the consent of the applicant, review and consider the application under an appropriate program, if any, covered by this part.

(Authority: 25 U.S.C. 2601-2651)

[49 FR 23761, June 7, 1984, as amended at 54 FR 20481, May 11, 1989]

PART 251—INDIAN EDUCATION—FORMULA GRANTS TO LOCAL EDUCATIONAL AGENCIES

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AUTHORITY: 25 U.S.C. 2601-2606, unless otherwise noted.

Subpart A—General

§ 251.1 Formula Grants—Local Educational Agencies.

This program, Formula Grants—Local Educational Agencies (LEAs), provides financial assistance to develop and carry out elementary and secondary school projects that meet the special educational and culturally related academic needs of Indian children.

(Authority: 25 U.S.C. 2601)

[49 FR 23764, June 7, 1984, as amended at 54 FR 19335, May 4, 1989]

§ 251.2 Who is eligible for assistance under this program?

(a) An LEA is eligible for assistance under this program.

(b)(1) An LEA other than a tribal school or a Bureau school is entitled to receive a grant only if the number of Indian children enrolled in the LEA's schools is either—

(i) At least 10; or

(ii) At least one-half of the total enrollment for that agency.

(2) However, an LEA may apply without regard to the enrollment requirements of paragraph (b)(1) of this section if it is located—

(i) In Alaska, California, or Oklahoma; or

(ii) On, or in proximity to, an Indian reservation.

(c) An LEA that is a Bureau school is eligible only if funds are available in accordance with section 5312(b)(3) of the Act.

(Authority: 25 U.S.C. 2602 (a), (b))

[54 FR 19335, May 4, 1989]

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§ 251.3 What regulations apply to this program?

The following regulations apply to this program:

(a)(1) The regulations in 34 CFR Part 250.

(2) However, 34 CFR 75.111 (d) and (e) of the Education Department General Administrative Regulations, relating to the contents of an application, do not apply to this program.

(b)(1) The regulations in this Part 251.

(2) However, the following provisions of this part do not apply to tribal schools or Bureau schools:

(i) Section 251.20, relating to the selection of the parent committee.

(ii) Any other provisions of this part relating to the parent committee.

(iii) Sections 251.31 and 251.32 relating to free public education.

(iv) Sections 251.40-251.42 relating to the maintenance of effort required for LEAs.

(Authority: 25 U.S.C. 2601-2606, 2651)

[49 FR 23764, June 7, 1984, as amended at 54 FR 19335, May 4, 1989]

§ 251.4 What defilitions apply to this program?

The definitions in 34 CFR 250.4 apply to this program.

(Authority: 25 U.S.C. 2601-2606)

Subpart B—What Kind of Activities Does the Secretary Assist Under This Program?

§ 251.10 What types of projects may be funded?

(a) The Secretary may fund applications proposing the—

(1) Establishment, maintenance, or operation of projects specifically designed to meet the special educational or culturally related academic needs, or both, of Indian children; or

(2) Training of counselors at the applicant's school in counseling techniques relevant to the treatment of alchol and substance abuse.

(b) An applicant may also apply for assistance to:

(1) Plan for and take other steps leading to the development of projects; and

(2) Carry out pilot projects designed to test the effectiveness of those plans.

(Authority: 25 U.S.C. 2603)

[49 FR 23764, June 7, 1984, as amended at 54 FR 19335, May 4, 1989]

Subpart C—How Does One Apply for a Grant?

§ 251.20 How is a parent committee selected?

(a) Before developing an application, an LEA—other than a tribal school or a Bureau School—shall establish and publicize procedures for the selection of a parent committee.

(b) The following are eligible to select and serve on a parent committee:

(1) Parents of Indian children who will participate in the proposed project.

(2) Teachers, including guidance counselors, except members of the project staff.

(3) Indian secondary school students, if any, enrolled in the LEA's schools.

(c)(1) At least half the members of the committee must be parents of the Indian children to be served by the proposed project.

(2) The committee must include at least one teacher and, where applicable, at least one secondary student to be served by the program for which assistance is sought.

(d) The persons listed in paragraph (b) of this section shall select the members of the committee.

(e) An individual may continue to be a member of the committee only so long as he or she is eligible under paragraph (b) of this section.

(Authority: 25 U.S.C. 2604(b)(2)(B), 2651)

[49 FR 23764, June 7, 1984, as amended at 54 FR 19335, May 4, 1989]

§ 251.21 Must an applicant hold a public hearing?

(a) Before preparing an application for a new or continuation award, an applicant shall hold one or more hearings open to the general public.

(b) At the public hearing or hearings, the applicant shall provide to the parents of Indian children—including persons acting *in loco parentis* — teachers, and, where applicable, secondary school students, a full opportunity to understand the project for which the applicant is seeking assistance and to offer recommendations on the project.

(c) In the case of an application for a continuation award, the grantee shall provide at the public hearing or hearings an opportunity for full public discussion of all aspects of the project to date and for the remainder of the project period.

(Authority: 25 U.S.C. 2604(b)(2)(B)(i), 2651)

[49 FR 23764, June 7, 1984, as amended at 54 FR 19335, May 4, 1989]

§ 251.22 How does the LEA determine the student count?

(a) Before including a student in the count of Indian children to generate funds under this part, an LEA shall—

(1) Establish a date or a period, not exceeding 30 days, during which the LEA conducts the count;

(2) Determine that the child was enrolled in the LEA's elementary or secondary schools on the count date or during the count period;

(3) Determine that the child received a free public education in the LEA's schools on the count date or during the count period; and

(4) Obtain for each child included in the count the student certification form prescribed by the Secretary.

(b) Before including a student in the count of Indian children to generate funds under this part, the LEA shall determine that the student certification form referred to in paragraph (a)(4) of this section includes, at a minimum:

(1) The student's name;

(2) The name of the eligible Indian tribe, band, or group of which the student, the parent, or the grandparent is a member, as defined by the tribe, band, or group; and

(3) The parent's signature and date.

(c) The LEA may include in the count a student whose student certification form does not have the parent's signature and date, provided that the parent's signature and date are obtained within 90 days of the start of the grant period for which the student is counted to generate funds under this part.

(Approved by the Office of Management and Budget under control number 1810-0031)

(Authority: 25 U.S.C. 2602(b), 2604(d), 2651)

[54 FR 19335, May 4, 1989]

Subpart D—How Does the Secretary Make a Grant?

§ 251.30 How does the Secretary determine the amount of a grant?

(a) The Secretary determines the amount an applicant receives any fiscal year on the basis of the formula in section 5312(b), of the Indian Education Act.

(b) Under the statutory formula, the Secretary computes the amount of the grant to which an applicant is entitled by multiplying:

(1) The number of Indian children enrolled in the schools of the applicant and to whom the applicant provides free public education; by

(2) The average per pupil expenditure for the LEA as determined under section 5312(b)(2)(C), of the Indian Education Act.

(c) In setting the amount of a grant, the Secretary allocates to each approved applicant an amount that bears the same ratio to the total amount appropriated as the product of paragraphs (b) (1) and (2) of this section for that applicant bears to the sum of these products for all approved applicants.

(Authority: 25 U.S.C. 2602(b), 2606)

[49 FR 23764, June 7, 1984, as amended at 50 FR 10924, Mar. 18, 1985; 54 FR 19336, May 4, 1989]

§ 251.31 Payments to local educational agencies.

The Secretary makes payments to an applicant local educational agency (LEA) for children claimed under section 5312(b), of the Indian Education Act, only if:

(a) The LEA is responsible under applicable State or Federal law for providing a free public education (as provided in § 251.32) to those children;

(b) The LEA is providing a free public education to those children; and

(c) The State provides funds for the education of those children on the same basis as all other public school children in the State.

(Authority: 25 U.S.C. 2602(b), 2651)

[52 FR 28232, July 28, 1987, as amended at 54 FR 19336, May 4, 1989]

§ 251.32 Free public education.

(a) As used in § 251.31, a free public education means education that is provided:

(1) At public expense;

(2) As the complete elementary and secondary educational program;

(3) In a school of the LEA or under a tuition arrangement with another LEA or other educational entity; and

(4) Under public supervision and direction.

(b) For the purpose of paragraph (a)(1) of this section, education is provided at public expense if:

(1) There is no tuition charge to the child or the child's parents; and

(2) Federal funds, other than Pub. L. 81-874 funds (Impact Aid) and Pub. L. 93-638 contract funds (Indian Self-Determination and Education Assistance Act), do not provide a substantial portion of the basic educational program.

(c) For the purpose of paragraph (a)(2) of this section, the complete elementary or secondary educational program is the program recognized by the State as meeting all requirements for elementary or secondary education for the children claimed. It is not a program that provides only:

(1) Supplementary services or instruction; or

(2) A portion of the required educational program.

(d) For the purpose of paragraph (a)(3) of this section, a tuition arrangement must:

(1) Satisfy all applicable legal requirements in the State; and

(2) Genuinely reflect the applicant LEA's responsibility to provide a free public education to the children claimed under section 5312(b), of the Indian Education Act.

(e) For the purpose of paragraph (a)(4) of this section, education provided under public supervision and direction means education that is provided:

(1) In a school of the applicant LEA or another LEA; or

(2) By another educational entity, over which the applicant LEA, or other public agency, exercises authority with respect to the significant aspects of the educational program for the children claimed. The Secretary considers significant aspects of the educational program to include administrative decisions relating to teachers, instruction, and curriculum.

(Authority: 25 U.S.C. 2602(b), 2651)

[52 FR 28233, July 28, 1987, as amended at 54 FR 19336, May 4, 1989]

Subpart E—What Conditions Must Be Met by a Grantee?

§ 251.40 What is the maintenance of effort requirement?

(a) Subject to the granting of a waiver under § 251.41, the Secretary makes full payments to an LEA for any fiscal year if the appropriate SEA finds that the combined fiscal effort of that LEA and the State with respect to the provision of free public education by that LEA for the preceding fiscal year was not less than 90 percent of the combined fiscal effort for that purpose for the second preceding fiscal year.

(b) The requirement of paragraph (a) of this section does not apply to an LEA that is a tribal school or a Bureau school.

(c) Subject to the granting of a waiver under § 251.41, if the Secretary determines that the LEA has failed to maintain the combined fiscal effort as required under paragraph (a) the Secretary reduces the LEA's award in the exact proportion by which the LEA failed to meet the combined fiscal effort requirement.

(d) For purposes of determining maintenance of effort, the "preceding fiscal year" means the Federal fiscal year or the 12-month fiscal period most commonly used in a State for official reporting purposes prior to the beginning of the Federal fiscal year in which funds are awarded.

Example: For funds awarded in fiscal year 1985 for expenditure by LEAs during the 1985-86 school year, if a State is using the Federal fiscal year, the "preceding fiscal year" is fiscal year 1984 (which began on October 1, 1983). The "second preceding fiscal year" is fiscal year 1983 (which began on October 1, 1982). If a State is using a fiscal year that begins on July 1, 1984, the "preceding fiscal year" is the 12-month fiscal period ending on June 30, 1984. The "second preceding fiscal year" is the 12-month fiscal period ending on June 30, 1983.

(e)(1) For the purpose of making the finding described in paragraph (a) of this section, an SEA may compute combined fiscal effort on the basis of either aggregate expenditures or per pupil expenditure.

(2)(i) As used in this section, "aggregate expenditures" means expenditures by the LEA and the State for free public education provided by that LEA.

(ii) The term includes expenditures for administration, instruction, attendance, health services, pupil transportation services, operation and maintenance of plant, fixed charges, and net expenditures to cover deficits for food services and student activities.

(iii) The term does not include expenditures for community services, capital outlay and debt service, or any expenditures from funds granted under Federal programs of assistance.

(3) As used in this section, "per pupil expenditures" means aggregate expenditures divided by the number of pupils in average daily attendance at the LEA's schools—as determined in accordance with State law—during the fiscal year for which the computation is made.

(Authority: 25 U.S.C. 2605(c), 2651)

[51 FR 4734, Feb. 7, 1986, as amended at 54 FR 19336, May 4, 1989]

§ 251.41 When may the Secretary grant a waiver of the maintenance of effort requirement?

(a) The Secretary may grant a waiver, for one year only, of the maintenance of effort requirement in § 251.40, if the Secretary determines that the LEA's failure to meet that requirement is due exceptional circumstances.

(b) An LEA may ask the Secretary to grant a waiver of the maintenance of effort requirement by submitting a request for a waiver that includes a description of the circumstances that the LEA considers to be exceptional.

(c)(1) Exceptional circumstances include but are not limited to:

(i) A natural disaster; or

(ii) A precipitious and unforeseen decline in the financial resources of the LEA.

(2) The Secretary does not consider tax initiatives or referenda to be exceptional circumstances.

(d) If the Secretary grants a waiver under paragraph (a) of this section, the affected LEA may receive its full allocation of formula grant funds.

(Approved by the Office of Management and Budget under control number 1810-0021)

(Authority: 25 U.S.C. 2605(c))

[51 FR 4734, Feb. 7, 1986, as amended at 53 FR 49144, Dec. 6, 1988; 54 FR 19336, May 4, 1989]

§ 251.42 What is the effect of a waiver on determination of an LEA's maintenance of effort in the following year?

No level of expenditures permitted under a waiver may be used as a basis for computing the fiscal effort required under § 251.40 for subsequent years. Instead, for subsequent years, fiscal effort must be computed on the basis of the level of expenditures that would have been required had a waiver not been granted.

Example: An LEA was granted a waiver in fiscal year 1985 because its fiscal effort in the preceding fiscal year (1984) was less than 90 percent of its fiscal effort in the second preceding fiscal year (1983) due to exceptional circumstances. In determining maintenance of effort for the purpose of funding in fiscal year 1986, the LEA's combined fiscal effort for the preceding fiscal year (1985) must be at least 81 percent (90 percent of 90 percent) of its fiscal effort in the third preceding fiscal year (1983).

(Authority: 25 U.S.C. 2605(c))

[51 FR 4734, Feb. 7, 1986, as amended at 54 FR 19336, May 4, 1989]

§ 251.43 How must a grantee use the results of its evaluations?

(a) If an evaluation under section 5314(a)(4) of the Act shows that a project is not making substantial progress toward meeting the objectives of the project and this part, the grantee shall amend its application in accordance with section 5314(c) of the Act.

(b) The amendments to the application must include changes that will enable the grantee to meet those objectives.

(Authority: 25 U.S.C. 2604 (a)(4), (c))

[54 FR 19336, May 4, 1989]

Subpart F—What Are the Administrative Responsibilities of a Grantee?

§ 251.50 What are the responsibilities of a grantee regarding student certification?

For each student included in the count of Indian students in accordance with § 251.22 and on which the amount of a grant is based, a grantee shall keep on file the student certification form prescribed by the Secretary.

(Approved by the Office of Management and Budget under control number 1810-0031)

(Authority: 25 U.S.C. 2604(d))

[49 FR 23764, June 7, 1984, as amended at 54 FR 19336, May 4, 1989]

§ 251.51 How does the Secretary determine a grantee's compliance with the student certification requirements?

Periodically, the Secretary reviews a grantee's records to determine, for the current fiscal year and for prior fiscal years for which the grantee is required to maintain records, if—

(a) The requirements in § 251.22 were met;

(b) A certification form that meets the requirements of § 251.22 is on file for each child included by the grantee in the count of children to generate funds under this part; and

(c) Each child counted by the grantee is otherwise eligible to be counted under this part.

(Approved by the Office of Management and Budget under control number 1810-0031)

(Authority: 25 U.S.C. 2601-2606)

[54 FR 19336, May 4, 1989]

§ 251.52 What action does the Secretary take if a grantee fails to meet the student certification requirements?

(a) If the Secretary determines under § 251.51 that a grantee is not in compliance with the student certification requirements, the grantee shall repay to the Department the amount of funds improperly generated. The Secretary may—

(1) Collect the funds awarded for each child inappropriately counted in the fiscal year or years at issue by—

(i) Demanding direct repayment from the grantee;

(ii) Reducing the grantee's current grant award where the Secretary's determination under paragraph (a) of the section concerns the current fiscal year; or

(iii) Offsetting the equivalent amount from the grantee's award for a fiscal year following the determination; and

(2) For one to three years following that determination, require the grantee to submit with its application for funds under this part a verification by an independent auditor that student certification forms have been completed and maintained by the grantee for each child included in the count in the application.

(b) In applying an administrative offset under § 251.52(a)(1)(iii), the Secretary uses the procedures contained in 34 CFR Part 30.

(Approved by the Office of Management and Budget under control number 1810-0031)

(Authority: 25 U.S.C. 2601-2606)

[54 FR 19336, May 4, 1989]

PART 252—INDIAN CONTROLLED SCHOOLS—ENRICHMENT PROJECTS

Subpart A—General

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252.1 Indian-Controlled Schools—Enrichment Projects.

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252.2 Who is eligible for assistance under this program?
252.3 What regulations apply to this program?
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Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

252.10 What types of projects may be funded?

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make a Grant?

252.30 How does the Secretary evaluate an application?
252.31 What selection criteria does the Secretary use?

AUTHORITY: 25 U.S.C. 2602(c), unless otherwise noted.

Subpart A—General

§ 252.1 Indian-Controlled Schools—Enrichment Projects.

This program, Indian Controlled Schools—Enrichment Projects, provides financial assistance for educational enrichment projects designed to meet the special educational and culturally related academic needs of Indian children in Indian-controlled elementary and secondary schools or LEAs.

(Authority: 25 U.S.C. 2602(c))

[49 FR 23767, June 7, 1984. Redesignated at 54 FR 20481, May 11, 1989, and amended at 54 FR 20482, May 11, 1989]

§ 252.2 Who is eligible for assistance under this program?

(a) Under this program any applicant among the following is eligible for assistance if it operates or plans to establish and operate a school for Indian children—or, if eligible, an LEA—that is located on or geographically near one or more reservations:

(1) Indian tribes;

(2) Indian organizations;

(3) Local educational agencies (LEAs) that have been in existence not more than three years.

(b) The requirement that a school to be assisted under this part be located on or near a reservation does not apply to any school serving Indian children in Alaska, California, or Oklahoma.

(Authority: 25 U.S.C. 2602(c))

[50 FR 10925, Mar. 18, 1985. Redesignated at 54 FR 20481, and amended at 54 FR 20482]

§ 252.3 What regulations apply to this program?

The following regulations apply to this program:

(a) The regulations in 34 CFR Part 250.

(b) The following provisions in 34 CFR Part 251:

(1)(i) Section 251.20, relating to the selection of the parent committee.

(ii) However, this requirement does not apply to an Indian tribe or Indian organization.

(iii) If an applicant LEA has formed or is forming a parent committee under 34 CFR 251.20 for the purpose of applying for a grant under 34 CFR Part 251 (Formula Grants—Local Educational Agencies) the LEA may have that committee serve as the parent committee for the purposes of this program.

(2) Section 251.21, relating to the holding of one or more public hearings.

(3)(i) Section 251.40, relating to the maintenance of effort required for LEAs.

(ii) However, this requirement does not apply to an Indian tribe or Indian organization.

(c)(1) The regulations in this Part 252.

(2) However, an Indian tribe or Indian organization is not subject to any provisions of this part relating to the parent committee.

(Authority: 25 U.S.C. 2602(c))

[49 FR 23767, June 7, 1984. Redesignated at 54 FR 20481, May 11, 1989, and amended at 54 FR 20482, May 11, 1989]

§ 252.4 What definitions apply to this program?

The definitions in 34 CFR 250.4 apply to this program.

(Authority: 25 U.S.C. 2601-2606, 2651)

[49 FR 23767, June 7, 1984. Redesignated at 54 FR 20481, May 11, 1989, and amended at 54 FR 20482, May 11, 1989]

Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

§ 252.10 What types of projects may be funded?

(a) The Secretary may fund applications proposing projects that include, but are not limited to, those designed to:

(1) Improve acquisition of basic academic skills;

(2) Stimulate interest in careers;

(3) Stimulate interest in tribal culture and organization;

(4) Prevent school dropouts and reduce absenteeism;

(5) Establish or improve preschool education programs, including kindergarten; or

(6) Develop or improve instructional materials.

(b) The activities listed in paragraph (a) of this section are examples of projects the Secretary may fund under this program. An applicant may propose to carry out one or more of these activities or any other activity that meets the purpose of this program.

(Authority: 25 U.S.C. 2602(c))

[49 FR 23767, June 7, 1984. Redesignated at 54 FR 20481, May 11, 1989, and amended at 54 FR 20482, May 11, 1989]

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make a Grant?

§ 252.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the criteria in § 252.31.

(b) The Secretary awards up to 100 possible total points for these criteria.

(c) The maximum possible score for each complete criterion is indicated in parentheses.

(Authority: 25 U.S.C. 2602(c), 2601)

[49 FR 23767, June 7, 1984. Redesignated at 54 FR 20481, May 11, 1989, and amended at 54 FR 20482, May 11, 1989]

§ 252.31 What selection criteria does the Secretary use?

The Secretary uses the following selection criteria in evaluating each application:

(a) *Need.* (20 points)

(1) The Secretary reviews each application to determine the need for the proposed project.

(2) In making this determination, the Secretary considers:

(i) The educational needs to be addressed by the project, including the extent and severity of these needs as indicated by the number and percentage of Indian children with the needs in the area to be served by the project and by such factors as dropout rates, academic achievement levels, standardized test scores, or other appropriate measures.

(ii) A description of the efforts being made to meet these needs and an explanation of why these efforts are insufficient;

(iii) A clear description of the educational approach to be used and why the applicant has chosen this approach;

(iv) Evidence that the approach is likely to be successful with the children who will participate in the project; and

(v) An explanation of why the applicant lacks the financial resources to conduct the project.

(b) *Plan of operation.* (20 points)

(1) The Secretary reviews each application to determine the quality of the plan of operation for the project.

(2) In making this determination, the Secretary looks for:

(i) A clear statement of the purpose of the project;

(ii) Objectives that are:

(A) Related to the purpose of the project;

(B) Sharply defined;

(C) Stated in measurable terms; and

(D) Capable of being achieved within the project period;

(iii) An activity plan, including a timeline, that clearly and realistically outlines the activities related to each objective; and

(iv) A plan for effective administration of the project.

(c) *Parental and community involvement.* (10 points)

(1) The Secretary reviews each application to determine the extent to which parents of the children to be served and other members of the Indian community are involved in the project.

(2) The Secretary looks for information that shows that parents and other members of the Indian community:

(i) Were involved in planning and developing the project; and

(ii) Will be involved in operating and evaluating the project.

(d) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application for information that shows the qualifications of the key personnel the applicant plans to use for the project.

(2) The Secretary looks for information that shows:

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (d)(2) (i) and (ii) of this section will commit to the project; and

(iv) The extent to which the applicant will give preference to Indians in the hiring of project staff.

(3) To determine personnel qualifications, the Secretary considers experience and training in fields related to the objectives of the project, as well as other information that the applicant provides.

(e) *Budget and cost effectiveness.* (10 points)

(1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows:

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (20 points)

(1) The Secretary reviews each application for information that shows the quality of the evaluation plan for the project.

(2) In making this determination, the Secretary considers:

(i) How well the evaluation will measure:

(A) The project's effectiveness in meeting each objective; and

(B) The impact of the project on the children involved;

(ii) The applicant's plan for collecting and analyzing data, including:

(A) The appropriateness of the instruments to collect the data;

(B) The appropriateness of the method for analyzing the data; and

(C) The timetable for collecting and analyzing the data; and

(iii) Procedures for:

(A) Periodic assessment of the progress of the project; and

(B) If necessary, modification of the project as a result of that assessment.

(g) *Adequacy of resources.* (10 points)

(1) The Secretary reviews each application to determine the extent to which the resources to be devoted to the project are adequate.

(2) In making this determination, the Secretary looks for information that shows:

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(Approved by the Office of Management and Budget under control number 1810-0021)

(Authority: 25 U.S.C. 2602(c), 2604)

[49 FR 23767, June 7, 1984, as amended at 53 FR 49144, Dec. 6, 1988. Redesignated at 54 FR 20481, May 11, 1989, and amended at 54 FR 20482, May 11, 1989]

PART 253—EDUCATIONAL SERVICES FOR INDIAN CHILDREN

Subpart A—General

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Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

253.10 What types of projects may be funded?

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make a Grant?

253.30 How does the Secretary evaluate an application?
253.31 To what applicants does the Secretary give priority?
253.32 What selection criteria does the Secretary use?

AUTHORITY: 25 U.S.C. 2621(a), (c), unless otherwise noted.

Subpart A—General

§ 253.1 Educational Services for Indian Children.

This program, Educational Services for Indian Children, provides financial assistance for:

(a) Projects designed to improve educational opportunities for Indian children by providing educational services that are not available in sufficient quantity or quality to those children; and

(b) Enrichment projects that introduce innovative and exemplary approaches, methods, and techniques into the education of Indian children in elementary and secondary schools.

(Authority: 25 U.S.C. 2621(a), (c))

[49 FR 23769, June 7, 1984. Redesignated and amended at 54 FR 20482, May 11, 1989]

§ 253.2 Who is eligible for assistance under this program?

The following are eligible for assistance under this program:

(a) State educational agencies (SEAs).

(b) Local educational agencies (LEAs).

(c) Indian tribes.

(d) Indian organizations.

(e) Indian institutions.

(f) Consortia of Indian tribes or Indian organizations, local educational agencies, and institutions of higher education for projects described in § 253.10(c)

(Authority: 25 U.S.C. 2621(c))

[49 FR 23769, June 7, 1984. Redesignated and amended at 54 FR 20482, May 11, 1989]

§ 253.3 What regulations apply to this program?

The following regulations apply to this program:

(a) The regulations in 34 CFR Part 250.

(b) The regulations in this Part 253.

(Authority: 25 U.S.C. 2621(a), (c))

[49 FR 23769, June 7, 1984. Redesignated and amended at 54 FR 20482, May 11, 1989]

§ 253.4 What definitions apply to this program?

The definitions in 34 CFR 250.4 apply to this program.

(Authority: 25 U.S.C. 2621(a), (c))

[49 FR 23769, June 7, 1984. Redesignated and amended at 54 FR 20482, May 11, 1989]

Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

§ 253.10 What types of projects may be funded?

(a) The Secretary may fund applications proposing projects that include, but are not limited to, those designed to:

(1) Improve acquisition of basic academic skills;

(2) Provide special educational services for handicapped and for gifted and talented Indian children;

(3) Stimulate interest in careers;

(4) Establish after-school educational centers;

(5) Stimulate interest in tribal culture and organization;

(6) Prevent school dropouts and reduce absenteeism;

(7) Establish or improve preschool education, including kindergarten;

(8) Provide guidance, counseling, and testing services; or

(9) Develop or improve instructional materials.

(b) The types of projects listed in paragraph (a) of this section are examples of projects the Secretary may d under this program. An applicant y propose to carry out one or more these activities or any other activity t meets the purposes of this pro m.

) Consortia of eligible applicants cribed in § 253.2(f) may receive nts to develop, improve, and imple nt programs to—

) Encourage Indian students to ac re a higher education; and

) Reduce the incidence of dropouts ong Indian elementary and second school students.

hority: 25 U.S.C. 2621(a)(2), (c))

FR 23769, June 7, 1984. Redesignated amended at 54 FR 20482, May 11, 1989]

Subpart C—[Reserved]

part D—How Does the Secretary Make a Grant?

.30 How does the Secretary evaluate an application?

) The Secretary evaluates an appli on on the basis of the criteria in 3.32.

) The Secretary awards up to 100 ible total points for these criteria.

) The maximum possible score for complete criterion is indicated in ntheses.

hority: 25 U.S.C. 2621 (a), (c), (f)(1), (2))

R 23769, June 7, 1984. Redesignated amended at 54 FR 20482, May 11, 1989]

.31 To what applicants does the Sec retary give priority?

addition to the points awarded r § 253.32, the Secretary awards oints to each application from an an tribe, Indian organization, or an institution, or from a consorti that includes an Indian tribe, an organization, or Indian institu of higher education.

hority: 25 U.S.C. 2621(f)(2)(B))

R 23769, June 7, 1984. Redesignated mended at 54 FR 20482 May 11, 1989]

.32 What selection criteria does the ecretary use?

e Secretary uses the following se on criteria in evaluating each ap tion:

(a) *Need.* (20 points)

(1) The Secretary reviews each application to determine the need for the proposed services.

(2) In making this determination, the Secretary considers:

(i) The needs to be addressed by the project, including the extent and severity of these needs as indicated by the number and percentage of Indian children in the area to be served by the project who require the proposed services and by such factors as dropout rates, academic achievement levels, standardized test scores, or other appropriate measures;

(ii) A description of other services in the area—including those offered by the applicant—that are designed to meet the same needs as those to be addressed by the project and the number of Indian children who receive these other services;

(iii) Evidence that these other services are insufficient in either quantity or quality or both, or an explanation of why they are not used by children who require the proposed services; and

(iv) An explanation of why the applicant lacks the financial resources to conduct the project.

(b) *Plan of operation.* (20 points)

(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the project.

(2) In making this determination, the Secretary looks for—

(i) A clear statement of the purpose of the project;

(ii) Objectives that are—

(A) Related to the purpose of the project;

(B) Sharply defined;

(C) Stated in measurable terms; and

(D) Capable of being achieved within the project period;

(iii) An activity plan, including a timeline, that clearly and realistically outlines the activities related to each objective; and

(iv) A plan for effective administration of the project.

(c) *Parental and community involvement.* (10 points)

(1) The Secretary reviews each application to determine the extent to which parents and other members of

the Indian community are involved in the project.

(2) The Secretary looks for information that shows that parents and other members of the Indian community:

(i) Were involved in planning and developing the project; and

(ii) Will be involved in operating and evaluating the project.

(d) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application to determine the quality of the staff that the applicant plans to use for the project.

(2) In making this determination, the Secretary considers—

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (d)(2) (i) and (ii) of this section will commit to the project; and

(iv) The extent to which the applicant will give preference to Indians in the hiring of project staff.

(3) To determine personnel qualifications, the Secretary considers experience and training in fields related to the objectives of the project, as well as other information that the applicant provides.

(e) *Budget and cost effectiveness.* (10 points)

(1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows:

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (20 points)

(1) The Secretary reviews each application to determine the quality of the plan for evaluating the project.

(2) In making this determination, the Secretary considers:

(i) How well the evaluation will measure:

(A) The project's effectiveness in meeting each objective; and

(B) The impact of the project on the children involved;

(ii) The applicant's plan for collecting and analyzing data, including:

(A) The appropriateness of the instruments to collect the data;

(B) The appropriateness of the method for analyzing the data; and

(C) The timetable for collecting and analyzing the data; and

(iii) Procedures for:

(A) Periodic assessment of the progress of the project; and

(B) If necessary, modification of the project as a result of that assessment.

(g) *Adequacy of resources.* (10 points)

(1) The Secretary reviews each application to determine the extent to which the resources to be devoted to the project are adequate.

(2) In making this determination the Secretary looks for information that shows:

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(Approved by the Office of Management and Budget under control number 1810-0021)

(Authority: 25 U.S.C. 2621 (c), (f)(1), (2))

[49 FR 23769, June 7, 1984, as amended at 53 FR 49144, Dec. 6, 1988. Redesignated and amended at 54 FR 20482, May 11, 1989]

PART 254—PLANNING, PILOT, AND DEMONSTRATION PROJECTS FOR INDIAN CHILDREN

Subpart A—General

Sec.

254.1 Planning, Pilot, and Demonstration Projects for Indian Children.
254.2 Who is eligible for assistance under this program?
254.3 What regulations apply to this program?
254.4 What definitions apply to this program?

Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

254.10 What types of projects may be funded?

Sec.

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make a Grant?

254.30 How does the Secretary evaluate an application?
254.31 To what applicants does the Secretary give priority?
254.32 What selection criteria does the Secretary use for a planning grant?
254.33 What selection criteria does the Secretary use for a pilot grant?
254.34 What selection criteria does the Secretary use for a demonstration grant?

AUTHORITY: 25 U.S.C. 2621(a)(1), (b), unless otherwise noted.

Subpart A—General

§ 254.1 Planning, Pilot, and Demonstration Projects for Indian Children.

This program, Planning, Pilot, and Demonstration Projects for Indian Children, provides financial assistance for planning, pilot, and demonstration projects designed to create, test, and demonstrate the effectiveness of programs for improving educational opportunities for Indian children.

(Authority: 25 U.S.C. 2621(a)(1), (b))

[49 FR 23770, June 7, 1884. Redesignated and amended at 54 FR 20482, May 11, 1989]

§ 254.2 Who is eligible for assistance under this program?

The following are eligible for assistance under this program:

(a) State educational agencies (SEAs).

(b) Local educational agencies (LEAs).

(c) Indian tribes.

(d) Indian organizations.

(e) Indian institutions.

(f) Federally supported elementary and secondary schools for Indian children.

(Authority: 25 U.S.C. 2621(b))

[49 FR 23770, June 7, 1884. Redesignated and amended at 54 FR 20482, May 11, 1989]

§ 254.3 What regulations apply to this program?

The following regulations apply to this program:

(a) The regulations in 34 CFR Part 250.

(b) The regulations in this Part 254.

(Authority: 25 U.S.C. 2621(a), (b))

[49 FR 23770, June 7, 1884. Redesignated and amended at 54 FR 20482, May 11, 1989]

§ 254.4 What definitions apply to this program?

The definitions in 34 CFR 250.4 apply to this program.

(Authority: 25 U.S.C. 2621(a), (b))

[49 FR 23770, June 7, 1884. Redesignated and amended at 54 FR 20482, May 11, 1989]

Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

§ 254.10 What types of projects may be funded?

(a)(1) The Secretary may fund applications proposing projects designed to plan, test, or demonstrate the effectiveness of programs for improving educational opportunities for Indian children.

(2) An applicant may apply separately for one or more planning grant, pilot grant, or demonstration grant.

(3) An applicant may not apply for more than one type of grant for each proposed project.

(b) Proposed planning, pilot, or demonstration projects may include, but are not limited to:

(1) Activities designed to develop, test, replicate, or adapt:

(i) Curricular materials to improve the academic achievement of Indian children;

(ii) Successful educational practices to improve the academic achievement of Indian children;

(iii) Programs related to the educational needs of educationally deprived Indian children; or

(iv) Techniques to lower the school dropout rate or reduce absenteeism among Indian children;

(2) Development, testing and validation, or demonstration of materials appropriate for measuring the academic achievement of Indian children: or

(3) Coordination of the operation of other federally assisted programs that may be used to assist in meeting the educational needs of Indian children.

(c) The types of projects listed in paragraph (b) of this section are examples of projects the Secretary may fund under this program. An applicant may propose to carry out one or more of these activities or any other activity that meets the purposes of this program.

(d) *Priorities.* (1) Each year the Secretary may select for priority for planning, pilot, or demonstration grants one or more of the types of projects listed in paragraph (b) of this section.

(2) The Secretary publishes the selected priorities, if any, in a notice in the FEDERAL REGISTER.

(Authority: 25 U.S.C. 2621(a)(1), (b))

[49 FR 23770, June 7, 1884. Redesignated and amended at 54 FR 20482, May 11, 1989]

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make a Grant?

§ 254.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the applicable criteria in § 254.32, § 254.33, or § 254.34, depending on the type of grant for which the applicant has applied.

(b) The Secretary awards up to 100 possible total points for the criteria established for each type of grant.

(c) The maximum possible score for each complete criterion is indicated in parentheses.

(Authority: 25 U.S.C. 2621(b))

[49 FR 23770, June 7, 1884. Redesignated and amended at 54 FR 20482, May 11, 1989]

§ 254.31 To what applicants does the Secretary give priority?

In addition to the points awarded under § 254.32, § 254.33, or § 254.34, the Secretary:

(a) Awards 25 points to each application from an Indian tribe, Indian organization, or Indian institution; and

(b)(1) May award up to 10 points to an application for the extent to which the applicant addresses the priorities, if any, selected by the Secretary under § 254.10(d); or

(2) May give absolute preference each application that addresses th priorities.

(Authority: 25 U.S.C. 2621(f)(2)(B))

[49 FR 23770, June 7, 1884. Redesignated 54 FR 20482, May 11, 1989, and amended 54 FR 20483, May 11, 1989]

§ 254.32 What selection criteria does Secretary use for a planning grant?

The Secretary uses the following lection criteria in evaluating each plication for a planning grant:

(a) *Need.* (20 points)

(1) The Secretary reviews each plication to determine the need and the soundness of the rationale the planning project.

(2) In making this determinati the Secretary looks for:

(i) An identification and descripti of the specific problem to be address and evidence that the problem is significant magnitude among Indi children;

(ii) A clear statement of the edu tional approach to be developed;

(iii) A description of the literatu review, site visits, or other appropri activity that shows that the appiica has made a serious attempt to le from other projects that address si lar needs or have tried similar proaches; and

(iv) Evidence that the project likely to serve as a model for comm nities with similar educational needs

(b) *Plan of operation.* (20 points)

(1) The Secretary reviews each plication for information that sho the quality of the plan of operati for the planning project.

(2) In making this determinati the Secretary looks for informati that shows:

(i) A clear statement of the purp of the project;

(ii) Objectives that are:

(A) Related to the purpose of project;

(B) Sharply defined;

(C) Stated in measurable terms;

(D) Capable of being achie within the project period.

(iii) An activity plan, including meline, that clearly and realistica outlines the activities related to objective; and

(iv) A plan for effective administration of the project.

(c) *Parental and community involvement.* (10 points)

(1) The Secretary reviews each application to determine the extent to which parents of the children to be served and other members of the Indian community are involved in the planning project.

(2) The Secretary looks for information that shows that parents and other members of the Indian community:

(i) Were involved in planning and developing the project; and

(ii) Will be involved in operating and evaluating the project.

(d) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application for information that shows the qualifications of the key personnel the applicant plans to use for the planning project.

(2) The Secretary looks for information that shows:

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (d)(2) (i) and (ii) of this section will commit to the project; and

(iv) The extent to which the applicant will give preference to Indians in the hiring of project staff.

(3) To determine personnel qualifications, the Secretary considers experience and training in fields related to the objectives of the project, as well as other information that the applicant provides.

(e) *Budget and cost effectiveness.* (10 points)

(1) The Secretary reviews each application for information that shows that the planning project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows:

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (20 points)

(1) The Secretary reviews each application to determine the quality of the plan for evaluating the planning project.

(2) In making this determination, the Secretary considers:

(i) How well the evaluation will measure the project's effectiveness in meeting each objective;

(ii) The applicant's plan for collecting and analyzing data, including:

(A) The appropriateness of the instruments to collect the data;

(B) The appropriateness for the method of analyzing the data; and

(C) The timetable for collecting and analyzing the data; and

(iii) Procedures for:

(A) Periodic assessment of the progress of the project; and

(B) If necessary, modification of the project as a result of that assessment.

(g) *Adequacy of resources.* (10 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the planning project.

(2) The Secretary looks for information that shows:

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(Approved by the Office of Management and Budget under control number 1810-0021)

(Authority: 25 U.S.C. 2621(b), (f)(1), (2))

[49 FR 23770, June 7, 1984, as amended at 53 FR 49144, Dec. 6, 1988. Redesignated at 54 FR 20482, May 11, 1989, and amended at 54 FR 20483, May 11, 1989]

§ 254.33 What selection criteria does the Secretary use for a pilot grant?

The Secretary uses the following selection criteria in evaluating each application for a pilot grant:

(a) *Need.* (20 points)

(1) The Secretary reviews each application to determine the need for and the soundness of the rationale for the pilot project;

(2) In making this determination, the Secretary looks for:

(i) An identification and description of the specific problem to be addressed and evidence that the problem is of significant magnitude among Indian children;

(ii) A clear statement of the educational approach to be tested in the project;

(iii) Evidence that:

(A) The plan on which the pilot project is based included an adequate literature review, site visits, or other appropriate activity; and

(B) The applicant has made a serious attempt to learn from research and from other projects that address similar needs or that have tried similar approaches; and

(iv) Evidence that the project is likely to serve as a model for communities with similar educational needs.

(b) *Plan of operation.* (20 points)

(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the pilot project.

(2) The Secretary looks for information that shows:

(i) A clear statement of the purpose of the project;

(ii) Objectives that are:

(A) Related to the purpose of the project;

(B) Sharply defined;

(C) Stated in measurable terms; and

(D) Capable of being achieved within the project period.

(iii) An activity plan, including a timeline, that clearly and realistically outlines the activities related to each objective; and

(iv) A plan for effective administration of the project.

(c) *Parental and community involvement.* (10 points)

(1) The Secretary reviews each application to determine the extent to which the parents of the children to be served and other members of the Indian community are involved in the pilot project.

(2) The Secretary looks for information that shows that parents and other members of the Indian community:

(i) Were involved in planning and developing the project; and

(ii) Will be involved in operating and evaluating the project.

(d) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application for information that shows the qualifications of the key personnel the applicant plans to use for the pilot project.

(2) The Secretary looks for information that shows:

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (d)(2) (i) and (ii) of this section will commit to the project;

(iv) The extent to which the applicant will give preference to Indians in the hiring of project staff; and

(v) The procedures the applicant intends to use to train staff for implementing the project.

(3) To determine personnel qualifications, the Secretary considers experience and training in fields related to the objectives of the project, as well as other information that the applicant provides.

(e) *Budget and cost effectiveness.* (10 points)

(1) The Secretary reviews each application for information that shows that the pilot project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows:

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (20 points)

(1) The Secretary reviews each application to determine the quality of the plan for evaluating the pilot project.

(2) In making this determination the Secretary considers:

(i) How well the evaluation will measure:

(A) The project's effectiveness in meeting each objective; and

(B) The impact of the project on the children involved;

(ii) The applicant's plan for collecting and analyzing data, including:

(A) The appropriateness of the instruments to collect the data;

(B) The appropriateness of the method for analyzing the data; and

(C) The timetable for collecting and analyzing the data; and

(iii) Procedures for:

(A) Periodic assessment of the progress of the project; and

(B) If necessary, modification of the project as a result of that assessment.

(g) *Adequacy of resources.* (10 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the pilot project.

(2) The Secretary looks for information that shows:

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(Approved by the Office of Management and Budget under control number 1810-0021)

(Authority: 25 U.S.C. 2621(b), (f)(1), (2))

[49 FR 23770, June 7, 1984, as amended at 53 FR 49144, Dec. 6, 1988. Redesignated at 54 FR 20482, May 11, 1989, and amended at 54 FR 20483, May 11, 1989]

§ 254.34 What selection criteria does the Secretary use for a demonstration grant?

The Secretary uses the following selection criteria in evaluating each application for a demonstration grant:

(a) *Need.* (15 points)

(1) The Secretary reviews each application to determine the need for and the soundness of the rationale for the demonstration project.

(2) In making this determination, the Secretary looks for:

(i) An identification and description of the specific problem to be addressed and evidence that the problem is of sufficient magnitude among Indian children;

(ii) A clear statement of the educational approach to be demonstrated and evidence that the project is likely to serve as a model for communities with similar educational needs; and

(iii) Evidence that:

(A) The plan and pilot project on which the demonstration project is based included an adequate literature review, site visits, or other appropriate activity; and

(B) The applicant has made a serious attempt to learn from research and from other projects that address similar needs or have tried similar approaches.

(b) *Plan of operation.* (15 points)

(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the demonstration project.

(2) In making this determination, the Secretary looks for information that shows:

(i) A clear statement of the purpose of the project;

(ii) Objectives that are:

(A) Related to the purpose of the project;

(B) Sharply defined;

(C) Stated in measurable terms; and

(D) Capable of being achieved within the project period;

(iii) An activity plan, including a timeline, that clearly and realistically outlines the activities related to each objective; and

(iv) A plan for effective administration of the project.

(c) *Parental and community involvement.* (10 points)

(1) The Secretary reviews each application to determine the extent to which the parents of the Indian children to be served and other members of the Indian community are involved in the demonstration project.

(2) The Secretary looks for information that shows that parents and other members of the Indian community:

(i) Were involved in planning and developing the project; and

(ii) Will be involved in operating and evaluating the project.

(d) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application for information that shows the qualifications of the key personnel to be used in the demonstration project.

(2) The Secretary looks for information that shows:

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (d)(2) (i) and (ii) of this section will commit to the development of the project;

(iv) The extent to which the applicant will give preference to Indians in the hiring of project staff; and

(v) The procedures the applicant intends to use to train staff, if necessary, for implementing the project.

(3) To determine personnel qualifications, the Secretary considers experience and training in fields related to the objectives of the project, as well as other information that the applicant provides.

(e) *Budget and cost effectiveness.* (10 points)

(1) The Secretary reviews each application for information that shows that the demonstration project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows:

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (15 points)

(1) The Secretary reviews each application to determine the quality of the plan for evaluating the demonstration project.

(2) In making this determination, the Secretary considers:

(i) How well the evaluation will measure:

(A) The project's effectiveness in meeting each objective; and

(B) The impact of the project on the children involved;

(ii) The applicant's plan for collecting and analyzing data, including:

(A) The appropriateness of the instruments to collect the data;

(B) The appropriateness of the method for analyzing the data; and

(C) The timetable for collecting and analyzing the data; and

(iii) Procedures for:

(A) Periodic assessment of the progress of the project; and

(B) If necessary, modification of the project as a result of that assessment.

(g) *Dissemination.* (15 points)

(1) The Secretary reviews each application for evidence that the applicant has an effective and efficient plan for disseminating informati about the demonstration project, i cluding the results of the project a any specialized materials developed the project.

(2) In making this determinatio the Secretary looks for:

(i) Information that shows hi quality in the design of the dissemin tion plan and procedures for evalu ing the effectivenes of the dissemin tion plan;

(ii) A description of the types of m terials the applicant plans to ma available and the methods for maki the materials available;

(iii) Provisions for demonstrati the methods and techniques used the project;

(iv) Provisions for assisting interes ed schools in adapting or adopting a successfully implementing the proje and

(v) Provisions for publicizing th findings of the project at the loc State, or national level.

(h) *Adequacy of resources.* (points)

(1) The Secretary reviews each a plication for information that sho that the applicant plans to devote ad quate resources to the demonstratio project.

(2) The Secretary looks for informa tion that shows:

(i) The facilities that the applica plans to use are adequate; and

(ii) The equipment and supplies tha the applicant plans to use are ad quate.

(Approved by the Office of Manageme and Budget under control number 1810 0021)

(Authority: 25 U.S.C. 2621(b), (f)(1), (2))

[49 FR 23770, June 7, 1984, as amended a 53 FR 49144, Dec. 6, 1988. Redesignated a 54 FR 20482, May 11, 1989, and amended a 54 FR 20483, May 11, 1989]

PART 255—GIFTED AND TALENTED PROGRAM

Subpart A—General

Sec.
255.1 What is the Gifted and Talented Pro- gram?

Sec.
255.2 Who is eligible for an award?
255.3 What regulations apply?
255.4 What definitions apply?
255.10 What activities may the Secretary fund?
255.11 Must the applicant or grantee coordinate activities with other entities?

Subpart B—[Reserved]

Subpart C—How does the Secretary Make an Award?

255.30 How does the Secretary evaluate an application?
255.31 What selection criteria does the Secretary use?
255.32 What other factors does the Secretary consider in selecting grantees?

AUTHORITY: 25 U.S.C. 2624(c), unless otherwise noted.

SOURCE: 54 FR 20483, May 11, 1989, unless otherwise noted.

Subpart A—General

§ 255.1 What is the Gifted and Talented Program?

This program provides five grants to Bureau-funded schools for gifted and talented program research, development and dissemination.

(Authority: 25 U.S.C. 2624(c))

§ 255.2 Who is eligible for an award?

Bureau-funded schools are eligible for grants under this program.

(Authority: 25 U.S.C. 2624(c), 2651)

§ 255.3 What regulations apply?

The following regulations apply to this program:

(a) The regulations in 34 CFR Part 250.

(b) The regulations in this Part 255.

(Authority: 25 U.S.C. 2624(c))

§ 255.4 What definitions apply?

The definitions in 34 CFR 250.4 apply to this program.

(Authority: 25 U.S.C. 2624(c))

§ 255.10 What activities may the Secretary fund?

The Secretary may fund program research and development, the development and dissemination of curriculum materials, and the development and dissemination of teacher training materials regarding one or more of the following:

(a) Gifted and talented students.

(b) College preparatory studies (including programs for Indian students interested in teaching careers).

(c) Students with special culturally related academic needs, including social, lingual, and cultural needs.

(d) Mathematics and science education.

(Authority: 25 U.S.C. 2624(c))

§ 255.11 Must the applicant or grantee coordinate activities with other entities?

(a) The supervisor of a Bureau school shall undertake jointly its application for, or administration of, a grant under this part with the supervisor of the local school board.

(b) Each grantee will work cooperatively with other recipients of funds under section 5324 of the Indian Education Act as part of a national network.

(Authority: 25 U.S.C. 2624(c), (d))

Subpart B—[Reserved]

Subpart C—How Does the Secretary Make an Award?

§ 255.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the applicable criteria in § 255.31.

(b) The Secretary awards up to 100 possible total points for these criteria.

(c) The maximum possible score for each complete criterion is indicated in parentheses.

(Authority: 25 U.S.C. 2624(c))

§ 255.31 What selection criteria does the Secretary use?

The Secretary uses the following selection criteria in evaluating each application:

(a) *Need.* (20 points). The Secretary assesses the need for the proposed project, including—

(1) The soundness of the rationale for the project and the extent and se-

verity among Indian children of the educational needs to be addressed;

(2) The extent to which the educational approach to be developed is likely to be successful in meeting the needs;

(3) The extent to which the applicant is knowledgeable about other projects that address similar needs or have tried similar approaches; and

(4) The likelihood that the project will serve as a model for communities with similar educational needs.

(b) *Plan of operation.* (20 points). The Secretary reviews the plan of operation to ensure that—

(1) The purpose of the project is consistent with the needs identified and the purpose of the funding program;

(2) The design of the project is of high quality;

(3) The objectives of the project—

(i) Relate to the purpose of the project;

(ii) Will provide clear and measurable indices of the project in progress in achieving its purpose; and

(iii) Are capable of being achieved within the project period;

(4) The activities are appropriate and should result in the accomplishment of the project objectives; and

(5) The plan of management is effective and ensures proper and efficient administration of the project.

(c) *Parental and community involvement.* (10 points). The Secretary determines whether parents of the children to be served and other members of the Indian community will be involved in the project, including the extent of their involvement in—

(1) Planning and developing the project; and

(2) Operating and evaluating the project.

(d) *Quality of key personnel.* (15 points). The Secretary reviews the key personnel the applicant plans to use on the project to ensure that—

(1) The project director has the experience and training needed for the position;

(2) Other key personnel have the experience and training needed for their positions in the project; and

(3) Sufficient time will be committed to the project by key personnel.

(e) *Budget and cost effectiveness.* (5 points). The Secretary reviews the budget to ensure that—

(1) The budget is adequate to support the project activities; and

(2) The costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (15 points) The Secretary reviews the evaluation plan to ensure that—

(1) The evaluation will measure the project's effectiveness in meeting each objective;

(2) The evaluation will measure the impact of the project on the children involved, if applicable;

(3) The instruments for collecting data and the methods for analyzing the data are appropriate;

(4) There is an appropriate timetable for collecting, analyzing, and reporting data;

(5) Procedures have been established for modification of the project, if necessary, as a result of periodic progress assessments; and

(6) Adequate provision has been made to cooperate with recipients of funds under section 5324 of the Indian Education Act in evaluating the project.

(g) *Dissemination.* (10 points). The Secretary reviews the plan for disseminating information about the project, including the results of the project and any materials developed by the project to ensure that—

(1) The dissemination plan is effective and and efficient;

(2) The materials disseminated are appropriate in terms of quality and utility;

(3) The method and techniques used by the project will be demonstrated;

(4) Schools interested in adapting or adopting the project's materials or methods will be assisted; and

(5) The findings of the project will be published at the local, State, or national level, and provision has been made to coordinate dissemination activities with recipients of funds under section 5324 of the Indian Education Act.

(h) *Adequacy of resources.* (5 points). The Secretary reviews the resources to be devoted to the project to ensure that—

(1) The facilities that the applicant plans to use are adequate; and

(2) The equipment and supplies that the applicant plans to use are adequate.

(Approved by the Office of Management and Budget under control number 1810-0021)

(Authority: 25 U.S.C. 2624(c), (d))

[54 FR 20483, May 11, 1989, as amended at 54 FR 51029, Dec. 12, 1989]

§ 255.32 What other factors does the Secretary consider in selecting grantees?

In addition to using the selection criteria in § 255.31, the Secretary selects projects that achieve a mixture of projects described in § 255.10 to ensure that students at all grade levels and students in all geographic areas of the country are able to participate in some projects funded under this program.

(Authority: 25 U.S.C. 2624(c), (d))

PART 256—EDUCATIONAL PERSONNEL DEVELOPMENT

Subpart A—General

Sec.
256.1 Educational Personnel Development.
256.2 Who is eligible for assistance under these programs?
256.3 What regulations apply to these programs?
256.4 What definitions apply to these programs?

Subpart B—What Kinds of Activities Does the Secretary Assist Under These Programs?

256.10 What types of projects may be funded?

Subpart C—How Does One Apply for a Grant?

256.20 What provisions for participation must an applicant make?

Subpart D—How Does the Secretary Make a Grant?

256.30 How does the Secretary evaluate an application?
256.31 To what applicants does the Secretary give priority?
256.32 What selection criteria does the Secretary use?
256.33 What other factors does the Secretary consider in selecting grantees under the section 5321(d) program?

Sec.

Subpart E—What Conditions Must Be Met by a Grantee

256.40 What costs are allowable for stipends and dependency allowances?
256.41 What other conditions must a grantee meet?

Subpart F—What Are the Administrative Responsibilities of a Grantee?

256.50 What preference must a grantee give in selecting participants?

Authority: 25 U.S.C. 2621(d), 2622, unless otherwise noted.

Source: 49 FR 23774, June 7, 1984, unless otherwise noted.

Subpart A—General

§ 256.1 Educational Personnel Development.

(a) Educational Personnel Development includes two programs supporting projects designed to:

(1) Prepare persons to serve Indian students as teachers, administrators, teacher aides, social workers, and ancillary educational personnel; and

(2) Improve the qualifications of persons serving Indian students in these capacities.

(b) The two programs included in Educational Personnel Development are:

(1) The program authorized by section 5321(d) of the Indian Education Act and referred to in this part as the section 5321(d) Program; and

(2) The program authorized by section 5322 of the Indian Education Act and referred to in this part as the section 5322 Program.

(Authority: 25 U.S.C. 2621(d), 2622)

[49 FR 23774, June 7, 1984, as amended at 54 FR 20484, May 11, 1989]

§ 256.2 Who is eligible for assistance under these programs?

(a) The following are eligible for assistance under the Section 5321(d) Program:

(1) Institutions of higher education.

(2) Local educational agencies (LEAs) in combination with institutions of higher education.

(3) State educational agencies (SEAs) in combination with institutions of higher education.

(b) The following are eligible for assistance under the Section 5322 Program:

(1) Institutions of higher education.

(2) Indian tribes.

(3) Indian organizations.

(Authority: 25 U.S.C. 2621(d), 2622)

[49 FR 23774, June 7, 1984, as amended at 54 FR 20484, May 11, 1989]

§ 256.3 What regulations apply to these programs?

The following regulations apply to these programs:

(a) The regulations in 34 CFR Part 250.

(b) The regulations in this Part 256.

(Authority: 25 U.S.C. 2621(d), 2622)

§ 256.4 What definitions apply to these programs?

The definitions in 34 CFR 250.4 apply to these programs.

(Authority: 25 U.S.C. 2621(d), 2622)

Subpart B—What Kinds of Activities Does the Secretary Assist Under These Programs?

§ 256.10 What types of projects may be funded?

(a) The Secretary may fund applications proposing projects designed to:

(1) Prepare persons to serve Indian students as educational personnel or ancillary educational personnel, as described in paragraph (b) of this section;

(2) Improve the qualifications of persons serving Indian students in these types of positions; or

(3) Provide in-service training to persons serving Indian students in these types of positions.

(b) Projects assisted under these programs may prepare participants for positions such as teachers, special educators of handicapped or gifted and talented students, bilingual-bicultural specialists, guidance counselors, school psychologists, school administrators, teacher aides, social workers, adult education specialists or instructors, or college administrators.

(Authority: 25 U.S.C. 2621(d), 2622)

Subpart C—How Does One Apply for a Grant?

§ 256.20 What provisions for participation must an applicant make?

Prior to the submission of an applicant under this Part, each applicant shall—

(a) To the extent consistent with the number of eligible children in the area to be served who are enrolled in private nonprofit elementary and secondary schools and whose needs are of the type that the program is intended to meet, make provision for the participation on an equitable basis of persons serving or preparing to serve these children as educational personnel or ancillary educational personnel; and

(b) Have provided for adequate participation by relevant tribal communities, including parents of Indian children, in planning and developing this project and have made provision for their participation in operating and evaluating the project.

(Authority: 25 U.S.C. 2621 (d), (f)(1), (2), 2622)

[54 FR 20484, May 11, 1989]

Subpart D—How Does the Secretary Make a Grant?

§ 256.30 How does the Secretary evaluate an application?

(a) The Secretary reviews and approves applications under the section 5321(d) Program separately from applications under the section 5322 Program.

(b) The Secretary evaluates each application under either program on the basis fo the criteria in § 256.32.

(c) The Secretary awards up to 100 possible total points for these criteria.

(d) The maximum possible score for each complete criterion is indicated in parentheses.

(Authority: 25 U.S.C. 2621(d), 2622)

[49 FR 23774, June 7, 1984, as amended at 54 FR 20484, May 11, 1989]

§ 256.31 To what applicants does the Secretary give priority?

In addition to the points awarded under § 256.32, the Secretary awards:

(a) Ten points to each application proposing a project in which all participants will be enrolled in—

(1) A course of study resulting in a degree at the bachelor's level or higher; or

(2) Courses beyond the bachelor's degree.

(b) Ten points to each application under the Section 5321(d) Program from an Indian institution of higher education;

(c) Ten points to each application under the Section 5321(d) Program proposing a project in which 100 percent of participants will be Indian.

(d) Fifteen points to each application under the Section 5322 Program from an Indian institution of higher education, Indian tribe, or Indian organization.

(Authority: 25 U.S.C. 2621 (d) and (f)(2)(B), 2622)

[49 FR 23774, June 7, 1984, as amended at 54 FR 20484, May 11, 1989]

§ 256.32 What selection criteria does the Secretary use?

The Secretary uses the following selection criteria in evaluating each application:

(a) *Need.* (20 points)

(1) The Secretary reviews each application to determine the need for the type of personnel to be trained.

(2) In making this determination the Secretary considers—

(i) The conclusions of and supporting evidence from a current needs assessment or other appropriate documentation; and

(ii) The recency fo the assessment or other documentation.

(b) *Plan of operation.* (25 points)

(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the project.

(2) In making this determination, the Secretary looks for:

(i) A clear statement of the purpose of the project;

(ii) Objectives that are:

(A) Related to the purpose of the project;

(B) Sharply defined;

(C) Stated in measurable terms; and

(D) Capable of being achieved within the project period.

(iii) An activity plan, including a timeline, that clearly and realistically outlines the activities related to each objective;

(iv) Techniques designed specifically to enable project participants to meet the needs of Indian students; and

(v) A plan for effective administration of the project.

(c) *Benefit to Indian students.* (10 points)

(1) The Secretary reviews each application to determine the likelihood that, after receiving training under the project, the participants will serve Indian studelts as educational personnel or ancillary educational personnel, as described in § 256.10(b).

(2) In making this determination, the Secretary considers:

(i) Policies or practices of the applicant, such as those governing selection of participants, that increase the likelihood that participants will serve Indian students on completion of the training; and

(ii) Evidence that, on completion of the training, participants will be able to obtain positions that involve the education of Indian students.

(d) *Quality of key personnel.* (15 points)

(1) The Secretary reviews each application to determine the quality of the staff that the applicant plans to use for the project.

(2) In making this determination, the Secretary considers:

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (d)(2) (i) and (ii) of this section will commit to the project; and

(iv) The extent to which the applicant will give preference to Indians in the hiring of project staff.

(3) To determine personnel qualifications, the Secretary considers experience and training in fields related to

the objectives of the project, as well as other information that the applicant provides.

(e) *Budget and cost effectiveness.* (10 points)

(1) The Secretary reviews each application to determine the extent to which the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows:

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (10 points)

(1) The Secretary reviews each application to determine the quality of the plan for evaluating the project.

(2) In making this determination, the Secretary considers:

(i) How well the evaluation will measure:

(A) The project's effectiveness in meeting each objective; and

(B) The impact of the project on the participants; and

(ii) Procedures for:

(A) Periodic assessment of the progress of the project; and

(B) If necessary, modification of the project as a result of that assessment.

(g) *Adequacy of resources.* (10 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the project.

(2) In making this determination, the Secretary looks for information that shows:

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(Approved by the Office of Management and Budget under control number 1810-0021)

(Authority: 25 U.S.C. 2621 (d), (f)(1), (2), 2622)

[49 FR 23774, June 7, 1984, as amended at 53 FR 49144, Dec. 6, 1988; 54 FR 20484, May 11, 1989]

§ 256.33 What other factors does the Secretary consider in selecting grantees under the section 5321(d) program?

In addition to using the selection criteria in § 256.32, the Secretary considers the prior performance of a grantee under the section 5321(d) program in selecting grantees for new awards under the section 5321(d) program.

(Authority: 25 U.S.C. 2621(d)(4))

[54 FR 20484, May 11, 1989]

Subpart E—What Conditions Must Be Met by a Grantee?

§ 256.40 What costs are allowable for stipends and dependency allowances?

(a) A grantee may, from project funds, pay to participants stipends and allowances for dependents.

(b) Each year, the Secretary announces in a notice in the FEDERAL REGISTER the estimated maximum amount of a stipend and the estimated maximum amount of an allowance for dependents.

(c)(1) In determining a participant's need for assistance and the amount of the assistance, the grantee shall deduct financial assistance—other than loans—received or expected to be received by the participant for his or her living expenses and for the support of his or her dependents.

(2) The total financial assistance provided to a participant from all sources other than loans may not exceed the participant's need for that assistance.

(d)(1) Unless approved by the Secretary, the grantee may not pay a stipend or dependency allowance to a participant who is not a full-time student.

(2) The Secretary may approve payment of a partial stipend to a teacher aide who must take leave without pay in order to be a part-time student.

(Authority: 25 U.S.C. 2621(d), 2622)

§ 256.41 What other conditions must a grantee meet?

Each grantee shall provide adequate information to participants about the intent of the training program.

(Authority: 25 U.S.C. 2621(d), 2622)

[54 FR 20485, May 11, 1989]

Subpart F—What Are the Administrative Responsibilities of a Grantee?

§ 256.50 What preference must a grantee give in selecting participants?

In selecting project participants, a grantee shall give preference to Indians.

(Authority: 25 U.S.C. 2621(d), 2622)

PART 257—EDUCATIONAL SERVICES FOR INDIAN ADULTS

Subpart A—General

Sec.
257.1 Educational Services for Indian Adults.
257.2 Who is eligible for assistance under this program?
257.3 What regulations apply to this program?
257.4 What definitions apply to this program?

Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

257.10 What types of projects may be funded?

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make a Grant?

257.30 How does the Secretary evaluate an application?
257.31 What selection criteria does the Secretary use?

AUTHORITY: 25 U.S.C. 2631, unless otherwise noted.

SOURCE: 49 FR 23776, June 7, 1984, unless otherwise noted.

Subpart A—General

§ 257.1 Educational Services for Indian Adults.

This program, Educational Services for Indian Adults, provides financial assistance for educational service projects designed to improve educational opportunities for Indian adults.

(Authority: 25 U.S.C. 2631(b))

§ 257.2 Who is eligible for assistance under this program?

The following are eligible for assistance under this program:

(a) Indian tribes.

(b) Indian organizations.

(c) Indian institutions.

(Authority: 25 U.S.C. 2631(b))

§ 257.3 What regulations apply to this program?

The following regulations apply to this program:

(a) The regulations in 34 CFR Part 250.

(b) The regulations in this Part 257.

(Authority: 25 U.S.C. 2631)

§ 257.4 What definitions apply to this program?

The definitions in 34 CFR 250.4 apply to this program.

(Authority: 25 U.S.C. 2631)

Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

§ 257.10 What types of projects may be funded?

(a) The Secretary makes grants under this program for services and instruction below the college level.

(b) The Secretary may fund applications proposing projects designed to:

(1) Enable Indian adults to acquire basic educational skills, including literacy;

(2) Enable Indian adults to continue their education through the secondary school level;

(3) Establish career education projects intended to improve employment opportunities; and

(4) Provide educational services or instruction for:

(i) Handicapped or elderly Indian adults; or

(ii) Incarcerated Indian adults.

(c) The types of projects listed in paragraph (b) of this section are examples of projects the Secretary may fund under this program. An applicant may propose to carry out one or more of these activities or any other activities that meets the purposes of this program.

(d)(1) The Secretary does not fund under this program activities designed solely to prepare individuals to enter a specific occupation or cluster of closely related occupations in an occupational field after participating in the project.

(2) However, if the following types of activities are otherwise authorized under this part, the Secretary may fund:

(i) Activities that are designed to prepare individuals to benefit from occupational training; and

(ii) Activities that incidentally involve the teaching of employment-related skills.

(Authority: 25 U.S.C. 2631)

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make a Grant?

§ 257.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the criteria in § 257.31.

(b) The Secretary awards up to 100 possible total points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

(Authority: 25 U.S.C. 2631(b))

§ 257.31 What selection criteria does the Secretary use?

The Secretary uses the following selection criteria in evaluating each application:

(a) *Need.* (20 points)

(1) The Secretary reviews each application to determine the need for the proposed services.

(2) In making this determination, the Secretary considers:

(i) The needs to be addressed by the project, including the extent and severity of these needs as indicated by the number and percentage of Indian adults in the area to be served by the project who need the proposed services and by such factors as elementary and secondary school dropout or absenteeism rates, average grade level
completed, unemployment rates,
other appropriate measures;

(ii) A description of other services
the area—including those offered
the applicant—that are designed
meet the same needs as those to be a
dressed by the project, and t
number of Indian adults who recei
these other services;

(iii) Evidence that these other ser
ices are insufficient in quantity
quality or both, or an explanation
why these other services are not us
by adults who require the propos
services; and

(iv) An explanation of why the a
plicant lacks the financial resources
conduct the project.

(b) *Plan of operation.* (20 points)

(1) The Secretary reviews each a
plication for information that sho
the quality of the plan of operati
for the project.

(2) The Secretary looks for inform
tion that shows:

(i) A clear statement of the purpo
of the project;

(ii) Objectives that are:

(A) Related to the purpose of t
project;

(B) Sharply defined;

(C) Stated in measurable terms; a

(D) Capable of being achiev
within the project period.

(iii) An activity plan, including a
meline, that clearly and realistica
outlines the activities related to ea
objective; and

(iv) A plan for effective administ
tion of the project.

(c) *Community involvement.* (
points)

(1) The Secretary reviews each a
plication to determine the extent
which the individuals to be served a
other members of the Indian comm
nity are involved in the project.

(2) The Secretary looks for inform
tion that shows that individuals to
served and other members of t
Indian community:

(i) Were involved in planning and
veloping the project; and

(ii) Will be involved in operating a
evaluating the project.

(d) *Quality of key personnel.* (
points)

(1) The Secretary reviews each a
plication to determine the quality

the staff that the applicant plans to use for the project.

(2) The Secretary looks for information that shows:

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (d)(2) (i) and (ii) of this section will commit to the project; and

(iv) The extent to which the applicant will give preference to Indians in the hiring of project staff.

(3) To determine personnel qualifications, the Secretary considers experience and training in fields related to the objectives of the project, as well as other information that the applicant provides.

(e) *Budget and cost effectiveness.* (10 points)

(1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows:

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (20 points)

(1) The Secretary reviews each application for information to determine the quality of the plan for evaluating the project.

(2) In making this determination, the Secretary considers:

(i) How well the evaluation will measure:

(A) The project's effectiveness in meeting each objective; and

(B) The impact of the project on the adults involved;

(ii) The applicant's plan for collecting and analyzing data including:

(A) The appropriateness of the instruments to collect the data;

(B) The appropriateness of the method for analyzing the data; and

(C) The timetable for collecting and analyzing the data; and

(iii) Procedures for:

(A) Periodic assessment of the progress of the project; and

(B) If necessary, modification of the project as a result of that assessment.

(g) *Adequacy of resources.* (10 points)

(1) The Secretary reviews each application to determine the extent to which the resources to be devoted to the project are adequate.

(2) In making this determination, the Secretary looks for information that shows:

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(Approved by the Office of Management and Budget under control number 1810-0021)

(Authority: 25 U.S.C. 2631 (b), (d))

[49 FR 23776, June 7, 1984, as amended at 53 FR 49144, Dec. 6, 1988]

PART 258—PLANNING, PILOT, AND DEMONSTRATION PROJECTS FOR INDIAN ADULTS

Subpart A—General

Sec.
258.1 Planning, Pilot, and Demonstration Projects for Indian Adults.
258.2 Who is eligible for assistance under this program?
258.3 What regulations apply to this program?
258.4 What definitions apply to this program?

Subpart B—What Kinds of Activities Does the Secretary Assist under This Program?

258.10 What types of projects may be funded?

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make a Grant?

258.30 How does the Secretary evaluate an application?
258.31 To what applicants does the Secretary give priority?
258.32 What selection criteria does the Secretary use for a planning grant?
258.33 What selection criteria does the Secretary use for a pilot grant?
258.34 What selection criteria does the Secretary use for a demonstration grant?

AUTHORITY: 25 U.S.C. 2631(a), unless otherwise noted.

SOURCE: 49 FR 23777, June 7, 1984, unless otherwise noted.

Subpart A—General

§ 258.1 Planning, Pilot, and Demonstration Projects for Indian Adults.

This program, Planning, Pilot, and Demonstration Projects for Indian Adults, provides financial assistance for planning, pilot, and demonstration projects designed to create, test, and demonstrate the effectiveness of programs for improving employment and educational opportunities for Indian adults.

(Authority: 25 U.S.C. 2631(a))

§ 258.2 Who is eligible for assistance under this program?

The following are eligible for assistance under this program:

(a) State educational agencies (SEAs).

(b) Local educational agencies (LEAs).

(c) Indian tribes.

(d) Indian organizations.

(e) Indian institutions.

(Authority: 25 U.S.C. 2631(a))

§ 258.3 What regulations apply to this program?

The following regulations apply to this program:

(a) The regulations in 34 CFR Part 250.

(b) The regulations in this Part 258.

(Authority: 25 U.S.C. 2631(a))

§ 258.4 What definitions apply to this program?

The definitions in 34 CFR 250.4 apply to this program.

(Authority: 25 U.S.C. 2631(a))

Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

§ 258.10 What types of projects may be funded?

(a)(1) The Secretary may fund applications proposing projects designed to plan, test, or demonstrate the eff tiveness of programs for improvi employment and educational oppor nities for Indian adults.

(2) An applicant may apply separa ly for one or more planning gran pilot grants, or demonstration grant

(3) An applicant may not apply more than one type of grant for ea proposed project.

(b) Proposed planning, pilot, or de onstration projects may include, are not limited to, activities design to develop, test, replicate, or adapt—

(1) Educational approaches to ass Indian adults in achieving basic lit acy;

(2) Methods for improving the ba skills of Indian adults so that th may benefit from occupational tra ing; or

(3) Educational approaches to ass Indian adults in qualifying for hi school equivalency certificates in t shortest time feasible.

(c) The types of projects listed paragraph (b) of this section are amples of projects the Secretary m fund under this program. An applica may propose to carry out one or mo of these activities or any other activ that meets the purposes of this p gram.

(d) If a proposed project includ services and instruction, those servic and instruction must be below the c lege level.

(e)(1) The Secretary does not fu under this program activities design solely to prepare individuals to enter specific occupation or cluster of clo ly related occupations in an occup tional field after participating in t project.

(2) However, if the following typ of activities are otherwise authoriz under this part, the Secretary m fund:

(i) Activities that are designed prepare individuals to benefit from o cupational training; and

(ii) Activities that incidentally i volve the teaching of employment-r lated skills.

(f) *Priorities.* (1) Each year the Se retary may select for priority for pla ning, pilot, or demonstration gran one or more of the types of projec listed in paragraph (b) of this section

(2) The Secretary publishes the selected priorities, if any, in a notice in the FEDERAL REGISTER.

(Authority: 25 U.S.C. 2631(a))

[49 FR 23777, June 7, 1984, as amended at 54 FR 20485, May 11, 1989]

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make a Grant?

§ 258.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application on the basis of the applicable criteria in § 258.32, 258.33, or 258.34, depending on the type of grant for which the applicant has applied.

(b) The Secretary awards up to 100 possible total points for the criteria established for each type of grant.

(c) The maximum possible score for each complete criterion is indicated in parentheses.

(Authority: 25 U.S.C. 2631(a))

§ 258.31 To what applicants does the Secretary give priority?

In addition to the points awarded under § 258.32, 258.33, or 258.34, the Secretary:

(a) Awards 25 points to each application from an Indian tribe, Indian organization, or Indian institution; and

(b)(1) May award up to 10 points to an application for the extent to which the applicant addresses the priorities, if any, selected by the Secretary under § 258.10(f); or

(2) May give absolute preference to applications that address these priorities.

(Authority: 25 U.S.C. 2631(d)(3))

§ 258.32 What selection criteria does the Secretary use for a planning grant?

The Secretary uses the following selection criteria in evaluating each application for a planning grant:

(a) *Need.* (20 points)

(1) The Secretary reviews each application to determine the need for and the soundness of the rationale for the planning project.

(2) In making this determination, the Secretary looks for:

(i) An identification and description of the specific problem to be addressed and evidence that the problem is of sufficient magnitude among Indian adults;

(ii) A clear statement of the educational approach to be developed;

(iii) A description of the literature review, site visits, or other appropriate activity that shows that the applicant has made a serious attempt to learn from other projects that address similar needs or have tried similar approaches; and

(iv) Evidence that the project is likely to serve as a model for communities with similar educational needs.

(b) *Plan of operation.* (20 points)

(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the planning project.

(2) In making this determination, the Secretary looks for information that shows:

(i) A clear statement of the purpose of the project;

(ii) Objectives that are:

(A) Related to the purpose of the project;

(B) Sharply defined;

(C) Stated in measurable terms; and

(D) Capable of being achieved within the project period.

(iii) An activity plan, including a timeline, that clearly and realistically outlines the activities related to each objective; and

(iv) A plan for effective administration of the project.

(c) *Community involvement.* (10 points)

(1) The Secretary reviews each application to determine the extent to which individuals to be served and other members of the Indian community are involved in the planning project.

(2) The Secretary looks for information that shows that individuals to be served and other members of the Indian community:

(i) Were involved in planning and developing the project; and

(ii) Will be involved in operating and evaluating the planning project.

(d) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application for information that shows the qualifications of the key personnel the applicant plans to use for the planning project.

(2) The Secretary looks for information that shows:

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (d)(2) (i) and (ii) of this section will commit to the project; and

(iv) The extent to which the applicant will give preference to Indians in the hiring of project staff.

(3) To determine personnel qualifications, the Secretary considers experience and training in fields related to the objectives of the project, as well as other information that the applicant provides.

(e) *Budget and cost effectiveness.* (10 points)

(1) The Secretary reviews each application for information that shows that the planning project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows:

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (20 points)

(1) The Secretary reviews each application to determine the quality of the plan for evaluating the project.

(2) In making this determination, the Secretary considers:

(i) How well the evaluation will measure the project's effectiveness in meeting each objective;

(ii) The applicant's plan for collecting and analyzing data, including:

(A) The appropriateness of the instruments to collect the data;

(B) The appropriateness of the method for analyzing the data; and

(C) The timetable for collecting and analyzing the data; and

(iii) Procedures for:

(A) Periodic assessment of the progress of the project; and

(B) If necessary, modification of the project as a result of that assessment.

(g) *Adequacy of resources.* (10 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the planning project.

(2) The Secretary looks for information that shows:

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(Approved by the Office of Management and Budget under control number 1810-0021)

(Authority: 25 U.S.C. 2631 (a), (d))

[49 FR 23777, June 7, 1984, as amended at 53 FR 49144, Dec. 6, 1988]

§ 258.33 What selection criteria does the Secretary use for a pilot grant?

The Secretary uses the following selection criteria in evaluating each application for a pilot grant:

(a) *Need.* (20 points)

(1) The Secretary reviews each application to determine the need for and the soundness of the rationale for the pilot project.

(2) In making this determination, the Secretary looks for:

(i) An identification and description of the specific problem to be addressed and evidence that the problem is of significant magnitude among Indian adults;

(ii) A clear statement of the educational approach to be tested in the project;

(iii) Evidence that:

(A) The plan upon which the pilot project is based included an adequate literature review, site visits, or other appropriate activity; and

(B) The applicant has made a serious attempt to learn from research and from other projects that address similar needs or that have tried similar approaches; and

(iv) Evidence that the project is likely to serve as a model for communities with similar educational needs.

(b) *Plan of operation.* (20 points)

(1) The Secretary reviews each application for information that shows

the quality of the plan of operation for the pilot project.

(2) The Secretary looks for information that shows:

(i) A clear statement of the purpose of the project;

(ii) Objectives that are:

(A) Related to the purpose of the project;

(B) Sharply defined;

(C) Stated in measurable terms; and

(D) Capable of being achieved within the project period.

(iii) An activity plan, including a timeline, that clearly and realistically outlines the activities related to each objective; and

(iv) A plan for effective administration of the project.

(c) *Community involvement.* (10 points)

(1) The Secretary reviews each application to determine the extent to which individuals to be served and other members of the Indian community are involved in the pilot project.

(2) The Secretary looks for information that shows that individuals to be served and other members of the Indian community:

(i) Were involved in planning and developing the project; and

(ii) Will be involved in operating and evaluating the project.

(d) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application for information that shows the qualifications of the key personnel the applicant plans to use for the pilot project.

(2) The Secretary looks for information that shows:

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (d)(2) (i) and (ii) of this section will commit to the project;

(iv) The extent to which the applicant will give preference to Indians in the hiring of project staff; and

(v) The procedures the applicant intends to use to train staff for implementing the project.

(3) To determine personnel qualifications, the Secretary considers experience and training in fields related to the objectives of the project as well as other information that the applicant provides.

(e) *Budget and cost effectiveness.* (10 points)

(1) The Secretary reviews each application for information that shows that the pilot project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows:

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (20 points)

(1) The Secretary reviews each application to determine the quality of the plan for evaluating the pilot project.

(2) In making this determination, the Secretary considers:

(i) How well the evaluation will measure:

(A) The project's effectiveness in meeting each objective; and

(B) The impact of the project on the adults involved;

(ii) The applicant's plan for collecting and analyzing data, including:

(A) The appropriateness of the instruments to collect the data;

(B) The appropriateness of the method for analyzing the data; and

(C) The timetable for collecting and analyzing the data; and

(iii) Procedures for:

(A) Periodic assessment of the progress of the project; and

(B) If necessary, modification of the project as a result of that assessment.

(g) *Adequacy of resources.* (10 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the pilot project.

(2) The Secretary looks for information that shows:

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(Approved by the Office of Management and Budget under control number 1810-0021)

(Authority: 25 U.S.C. 2631 (a), (d))

[49 FR 23777, June 7, 1984, as amended at 53 FR 49144, Dec. 6, 1988; 54 FR 20485, May 11, 1989]

§ 258.34 What selection criteria does the Secretary use for a demonstration grant?

The Secretary uses the following selection criteria in evaluating each application for a demonstration grant:

(a) *Need.* (15 points)

(1) The Secretary reviews each application to determine the need for and the soundness of the rationale for the demonstration project.

(2) In making this determination, the Secretary looks for:

(i) An identification and description of the specific problem to be addressed and evidence that the problem is of significant magnitude among Indian adults;

(ii) A clear statement of the educational approach to be demonstrated and evidence that the project is likely tm serve as a model for communities with similar educational needs; and

(iii) Evidence that:

(A) The plan and pilot project on which the proposed demonstratimn project is based included an adequate literature revieu, site visits, or other appropriate activity; and

(B) The applicant has made a serious attempt to learn from research and from other projects that address similar needs or have tried similar approaches.

(b) *Plan of operation.* (15 points)

(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the demonstration project.

(2) In making this determination, the Secretary looks for information that shows:

(i) A clear statement of the purpose of the project;

(ii) Objectives that are:

(A) Related to the purpose of the project;

(B) Sharply defined;

(C) Stated in measurable terms; and

(D) Capable of being achieved within the project period.

(iii) An activity plan, including a timeline, that clearly and realistically outlines the activities related to each objective; and

(iv) A plan for effective administration of the project.

(c) *Community involvement.* (10 points)

(1) The Secretary reviews each application to determine the extent to which the individuals to be served and other members of the Indian community are involved in the demonstration project.

(2) The Secretary looks for information that shows that individuals to be served and other members of the Indian community:

(i) Were involved in planning and developing the demonstration project; and

(ii) Will be involved in operating and evaluating the project.

(d) *Quality of key personnel.* (10 points)

(1) The Secretary reviews each application for information that shows the qualifications of the key personnel the applicant plans to use for the demonstration project.

(2) The Secretary looks for information that shows:

(i) The qualifications of the project director;

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraph (d)(2) (i) and (ii) of this section will commit to the development of the project;

(iv) The extent to which the applicant will give preference to Indians in the hiring of project staff; and

(v) The procedures the applicant intends to use to train staff, if necessary, for implementing the projects.

(3) To determine personnel qualifications, the Secretary considers experience and training in fields related to the objectives of the project, as well as other information that the applicant provides.

(e) *Budget and cost effectiveless.* (10 points)

(1) The Secretary reviews each application for information that shows that the demonstration project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows:

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (15 points)

(1) The Secretary reviews each application to determine the quality of the plan for evaluating the project.

(2) In making this determination, the Secretary considers:

(i) How well the evaluation will measure:

(A) The project's effectiveness in meeting each objective; and

(B) The impact of the project on the adults involved;

(ii) The applicant's plan for collecting and analyzing data, including:

(A) The appropriateness of the instruments to collect the data;

(B) The appropriateness of the method for analyzing the data; and

(C) The timetable for collecting and analyzing the data; and

(iii) Procedures for:

(A) Periodic assessment of the progress of the project; and

(B) If necessary, modification of the project as a result of that assessment.

(g) *Dissemination.* (15 points)

(1) The Secretary reviews each application for evidence that the applicant has an effective and efficient plan for disseminating information about the demonstration project, including the results of the project and any specialized materials developed by the project.

(2) In making this determination, the Secretary looks for:

(i) Information that shows high quality in the design of the dissemination plan and procedures for evaluating the effectiveness of the dissemination plan;

(ii) A description of the types of materials the applicant plans to make available and the methods for making the materials available;

(iii) Provisions for demonstrating the methods and techniques used by the project;

(iv) Provisions for assisting interested Indian communities in adapting or adopting and successfully implementing the project; and

(v) Provisions for publicizing the findings of the project at the local, State, or national level.

(h) *Adequacy of resources.* (10 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the demonstration project.

(2) The Secretary looks for information that shows:

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(Approved by the Office of Management and Budget under control number 1810-0021)

(Authority: 25 U.S.C. 2631 (a), (d))

[49 FR 23777, June 7, 1984, as amended at 53 FR 49144, Dec. 6, 1988; 54 FR 20485, May 11, 1989]

PART 263—INDIAN FELLOWSHIP PROGRAM

Subpart A—General

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263.25 Discontinuation of fellowship payments.

Subpart E—Who Is Responsible for Grant Payments?

263.31 Disbursement of funds.

AUTHORITY: 25 U.S.C. 2623, unless otherwise noted.

Subpart A—General

§ 263.1 What is the Indian Fellowship Program?

The Indian Fellowship Program provides fellowships to enable Indian students to pursue a course of study leading to—

(a) A postbaccalaureate degree in medicine, law, education, psychology, clinical psychology, or a related field; or

(b) An undergraduate or postbaccalaureate degree in business administration, engineering, natural resources, or a related field.

(Authority: 25 U.S.C. 2623)

[54 FR 21577, May 18, 1989]

§ 263.2 Who is eligible to apply under the Indian Fellowship Program?

(a) In order to be eligible for a fellowship an applicant must be:

(1) An Indian as defined in § 263.3;

(2) A United States citizen; and

(3)(i) Currently in attendance or accepted for admission as a full-time undergraduate or postbaccalaureate student at an accredited institution of higher education in one of the fields listed in § 263.4 or a related field; and

(ii) Recognized by that institution as a degree candidate.

(b) An applicant must not have obtained a terminal postbaccalaureate degree.

(Authority: 25 U.S.C. 2623)

[48 FR 35333, Aug. 3, 1983, as amended at 54 FR 21577, May 18, 1989]

§ 263.3 What definitions apply to the Indian Fellowship Program?

The following definitions apply to the Indian Fellowship Program:

Department means the U.S. Department of Education.

Dependent allowance means costs for the care of minor children who reside with the Fellow.

Expenses means tuition and required fees, required university health insurance, room, personal living expenses, and board at or near the institution, travel in cases of extreme hardship, instructional supplies, and dependent allowance.

Fellow means the recipient of a fellowship under the Indian Fellowship Program.

Fellowship means an award under the Indian Fellowship Program.

Full course load means the number of credit hours which the institution requires of a full-time student.

Full-time student means a student who:

(a) Is a degree candidate;

(b) Carries a full course load; and

(c) Is not employed for more than 20 hours a week.

Good standing means a cumulative grade point average of at least 2.0 on a 4.0 grade point scale in which failing grades are computed as part of the average, or another appropriate standard established by the institution.

Indian means an individual who is—

(a) A member of an Indian tribe, band, or other organized group of Indians (as defined by the Indian tribe, band, or other organized group), including those Indian tribes, bands, or groups terminated since 1940 and those recognized by the State in which they reside;

(b) A descendant, in the first or second degree, of an individual described in paragraph (a) of this definition;

(c) Considered by the Secretary of the Interior to be an Indian for any purpose; or

(d) An Eskimo, Aleut, or other Alaska Native.

Institution of higher education means that term as defined in 34 CFR 250.4.

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

Stipend means that portion of a fellowship award that is used for room and board and personal living expenses.

Undergraduate degree means a baccalaureate (bachelor's) degree awarded by an institution of higher education.

(Authority: 25 U.S.C. 2623, 2651)

[48 FR 35333, Aug. 3, 1983, as amended at 54 FR 21577, May 18, 1989]

§ 263.4 What are the allowable fields of study?

(a) The following are allowable fields for a postbaccalaureate degree under this program:

(1) Medicine.

(2) Clinical Psychology.

(3) Law.

(4) Education.

(5) Psychology.

(b) The following are allowable fields for an undergraduate or postbaccalaureate degree under this program:

(1) Business Administration.

(2) Engineering.

(3) Natural resources.

(c) The Secretary considers, on a case-by-case basis, the eligibility of applications for fellowships in related fields of study.

(Authority: 25 U.S.C. 2623)

[54 FR 21577, May 18, 1989]

§ 263.5 What does a fellowship award include?

(a) The Secretary awards a fellowship in an amount up to, but not more than, the expenses as defined in this Part. The assistance provided by the program either—

(1) Fully finances a student's educational expenses; or

(2) Supplements other financial aid, including Federal funding, other than loans, for meeting educational expenses.

(b) The Secretary announces the expected maximum amounts for subsistence and other fellowship costs in the annual application notice published in the FEDERAL REGISTER.

(Authority: 25 U.S.C. 2623)

[48 FR 35333, Aug. 3, 1983, as amended at 54 FR 21577, May 18, 1989]

Subpart B—What Should the Application Contain?

§ 263.6 Application contents: Evidence that the applicant is Indian.

An application must contain evidence that the applicant is Indian as defined in § 263.3 of this part.

(Approved by the Office of Management and Budget under control number 1810-0020)

(Authority: 25 U.S.C. 2623)

[48 FR 35333, Aug. 3, 1983, as amended at 54 FR 21577, May 18, 1989]

§ 263.7 Application contents: Evidence of admission or attendance.

(a) An application must contain evidence that the applicant is currently in attendance or has been accepted for admission as a full-time student at an accredited institution of higher education in one of the eligible fields of study listed in § 263.4.

(b) An applicant who has not yet been accepted for admission may submit an application that the Secretary may consider, provided that the applicant is accepted by an accredited institution of higher education by a date to be specified by the Secretary.

(Approved by the Office of Management and Budget under control number 1810-0020)

(Authority: 25 U.S.C. 2623)

[48 FR 35333, Aug. 3, 1983, as amended at 54 FR 21577, May 18, 1989]

§ 263.8 Application contents: Transcripts.

(a) An applicant for an undergraduate fellowship shall submit the most current official high school and, if appropriate, undergraduate transcripts.

(b) An applicant for a graduate fellowship shall submit the most current official undergraduate and, if appropriate, graduate transcripts.

(Approved by the Office of Management and Budget under control number 1810-0020)

(Authority: 25 U.S.C. 2623)

[48 FR 35333, Aug. 3, 1983, as amended at 54 FR 21577, May 18, 1989]

Subpart C—How Does the Secretary Select Fellows?

§ 263.11 What priorities may the Secretary establish?

(a) Each year the Secretary may establish priorities among the allowable fields of study described in § 263.4.

(b) The Secretary announces the priorities selected and the approximate amount of funds reserved for any combination of the various fields or related fields of study in the application notice published in the FEDERAL REGISTER.

(Authority: 25 U.S.C. 2623)

[48 FR 35333, Aug. 3, 1983, as amended at 54 FR 21577, May 18, 1989]

§ 263.12 How does the Secretary evaluate applications?

(a) The Secretary evaluates an application on the basis of the criteria listed in paragraphs (c), (d), and (e) of this section, in addition to the priority points awarded under § 263.13. The maximum possible point range for each criterion is stated in parentheses. The number of points the Secretary awards for each criterion depends on how well the application addresses all of the factors of that criterion. The total number of points available under the criteria in this section is 100.

(b) The Secretary evaluates and ranks an application with other applications for the same field and related fields.

(c) *Official academic record.* (80 points) (1) The Secretary considers the quality of the applicant's academic record and the applicant's potential for success in his or her field of study by reviewing the items in paragraphs (c)(2) and (3) of this section.

(2) The Secretary reviews the applicant's grade and if applicable standardized test scores, such as the Scholastic Aptitude Test (SAT), American College Testing Assessment Program (ACT), Graduate Record Examination (GRE), Law School Admissions Test (LSAT), Medical College Admission Test (MCAT), and achievements tests.

(3) The Secretary reviews the applicant's official transcripts and any grade reports and test scores.

(d) *Leadership.* (10 points) (1) The Secretary reviews documentation of any leadership positions held by the applicant while in school and three letters of assessment that address the applicant's potential for success and leadership in his or her field of study.

(2) The applicant shall submit three letters, one from each of the following groups:

(i) A school principal, a teacher, an academic or non-academic instructor or counselor.

(ii) A college professor, a coordinator of a project funded under Subpart 1 of the Indian Education Act of 1988, or an academic advisor.

(iii) A member of a parent committee for a project funded under Subpart 1 of the Indian Education Act of 1988, a tribal council member, or a civic leader who has observed the applicant in educational, social, or civic activities.

(e) *Commitment.* (10 points) (1) The Secretary considers the applicant's commitment by reviewing an educational commitment essay written by the applicant. The Secretary awards up to 10 points for this criterion.

(2) In reviewing the essay, the Secretary looks for:

(i) The applicant's ability to write clearly;

(ii) How well and the extent to which the applicant expresses a commitment of pursuing his or her chosen field of study; and

(iii) The extent to which the essay explains how participation in the fellowship program will enable the applicant to achieve his or her potential and assist him or her in providing leadership to the Indian Community.

(Approved by the Office of Management and Budget under control number 1810-0020)

(Authority: 25 U.S.C. 2623)

[48 FR 35333, Aug. 3, 1983, as amended at 53 FR 49144, Dec. 6, 1988; 54 FR 21577, May 18, 1989]

263.13 What priority is given to certain applicants?

(a) The Secretary awards not more an 10 percent of the fellowships, on priority basis, to persons receiving aining in guidance counseling with a ecialty in the area of alcohol and bstance abuse counseling and educa- on.

(b)The Secretary shall award 15 ad- tional points beyond those awarded der § 263.12 to applicants who apply r graduate fellowships in the fields business administration, engineer- , natural resources, and related elds.

uthority: 25 U.S.C. 2623)

FR 35333, Aug. 3, 1983, as amended at 54 21578, May 18, 1989]

part D—What Conditions Must Be Met by Fellows?

3.21 Required certification of information.

o verify further the accuracy of information provided in the appli- ion, the applicant shall provide all ormation and documents as re- ested by the Secretary, including in- mation on other financial aid rces for educational purposes. The licant's failure to provide the re- ested information and documents alidates the application.

proved by the Office of Management Budget under control number 1810-))

thority: 25 U.S.C. 2623)

FR 35333, Aug. 3, 1983, as amended at 54 21578, May 18, 1989]

3.22 Time period for a fellowship.

) The Secretary awards a fellow- for a period of time set by the ool as standard for the allowable d of study or for a period of time—

) Not to exceed four academic rs for an undergraduate or doctor- degree; and

) Not to exceed two academic years a master's degree.

) The Secretary reviews the status ach Fellow at the end of each year continues support only if the ow—

(1) Has complied with the Indian Education Act of 1988 and applicable regulations;

(2) Has remained a full-time student in good standing in the field in which the fellowship was awarded; and

(3) Has submitted a noncompeting continuation application requesting additional support.

(c) A fellowship terminates when the Fellow receives the degree being sought or after the Fellow has received the fellowship for the maximum number of years allowed as defined in paragraph (a) of this section, whichever comes first.

(d) A Fellow who received an undergraduate degree may seek support under this program to pursue a graduate level or postbaccalaureate degree by submitting a new application.

(Authority: 25 U.S.C. 2623)

[48 FR 35333, Aug. 3, 1983, as amended at 54 FR 21578, May 18, 1989]

§ 263.23 Responsibilities of a Fellow.

A Fellow shall—

(a) Start school during the first semester of the award at the institution named on the grant award document and complete at least one full academic term;

(b) Submit to the Secretary two copies of his or her official grade report at the close of each academic term at that institution; and

(c) Request a leave of absence from the Secretary for any interruption in his or her program of academic studies.

(Approved by the Office of Management and Budget under control number 1810-0020)

(Authority: 25 U.S.C. 2623)

[48 FR 35333, Aug. 3, 1983, as amended at 53 FR 49144, Dec. 6, 1988; 54 FR 21578, May 18, 1989]

§ 263.24 Leave of absence requests.

(a) A Fellow may request a leave of absence from the Secretary for a period not longer than 9 months.

(b) The Secretary permits a leave of absence only if the institution certifies that the Fellow is eligible to resume his or her course of study at the end of the leave of absence.

(Authority: 25 U.S.C. 2623)

[48 FR 35333, Aug. 3, 1983, as amended at 54 FR 21578, May 18, 1989]

§ 263.25 Discontinuation of fellowship payments.

(a) The Secretary may discontinue the fellowship, if the Fellow—

(1) Fails to comply with the provisions under this Part, including failure to obtain an approved leave of absence under § 263.24, or with the terms and conditions of the fellowship award; or

(2) Fails to report any change in his or her academic status.

(b) The Secretary will discontinue a fellowship only after providing reasonable notice and an opportunity for the Fellow to rebut, in writing or in an informal meeting with the responsible official in the Department of Education, the basis for the decision.

(Authority: 25 U.S.C. 2623)

[48 FR 35333, Aug. 3, 1983, as amended at 54 FR 21578, May 18, 1989]

Subpart E—Who is Responsible for Grant Payments?

§ 263.31 Disbursement of funds.

(a) Funds are disbursed directly to the institution of higher education where a Fellow is enrolled. Stipends must be distributed to Fellows in installments by the institution. No fewer than two installments per academic year may be made.

(b) If the fellowship is vacated or discontinued—

(1) The Secretary may elect to allow the fellowship to follow the Fellow to another institution if the Fellow transfers during the current award period and maintains eligibility for the award;

(2) The Secretary may award the unexpended funds from the fellowship to an alternate applicant at that institution for a period of study that does not exceed the term or amount of the original fellowship; or

(3) The Secretary may require the institution to return the unexpended funds.

(c) A Fellow who officially or unofficially withdraws or is expelled from an institution before completion of a term shall refund a prorated portion of the stipends, that has been received, as determined by the Secretary.

(Authority: 25 U.S.C. 2623)

[48 FR 35333, Aug. 3, 1983, as amended at 54 FR 21578, May 18, 1989]

PART 270—DESEGREGATION OF PUBLIC EDUCATION

Sec.
270.1 What are the Desegregation of Public Education Programs?
270.2 What regulations apply to these programs?
270.3 What definitions apply to these programs?
270.4 What types of projects are funded under these programs?
270.5 What stipends and related reimbursements are authorized under these programs?
270.6 What limitation is imposed on providing race and national origin desegregation assistance under these programs?

Authority: 42 U.S.C. 2000c-2000c-2, 2000c-5, unless otherwise noted.

Source: 52 FR 24963, July 1, 1987, unless otherwise noted.

§ 270.1 What are the Desegregation of Public Education Programs?

The Desegregation of Public Education Programs provide grants to projects that help public school districts and personnel in the preparation, adoption, and implementation of plans for the desegregation of public schools and in the development of effective methods of coping with special educational problems occasioned by desegregation.

(Authority: 42 U.S.C. 2000c-2000c-2, 2000c-5)

§ 270.2 What regulations apply to these programs?

The following regulations apply to these programs:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of Grants), Part 75 (Direct Grant Programs), Part 77 (Definitions That Apply to Department Regulations), Part 78 (Education Appeal Board), and Part 79 (Intergovernmental Review of Department of Education Programs and Activities), except that 34 CFR 75.200 through 75.217 (relating to the evaluation and competitive review of grants) do not apply to grants awarded under 34 CFR Part 271 and 34 CFR 75.232 (relating to the cost analysis) does not apply to grants under 34 CFR Part 272.

(b) The regulations in this part and in 34 CFR Parts 271 and 272.

(Authority: 42 U.S.C. 2000c-2000c-2, 2000c-5)

§270.3 What definitions apply to these programs?

In addition to the definitions in 34 CFR 77.1, the following definitions apply to the regulations in this part:

Desegregation assistance means the provision of technical assistance (including training) in the areas of race, sex, and national origin desegregation of public elementary and secondary schools.

Authority: 42 U.S.C. 2000c-2000c-2, 2000c-5)

Desegregation assistance areas neans the areas of race, sex, and naional origin desegregation.

Authority: 42 U.S.C. 2000c-2000c-2, 2000c-)

Desegregation Assistance Center neans a regional desegregation technial assistance and training center unded under 34 CFR Part 272.

Authority: 42 U.S.C. 2000c-2000c-2, 2000c-)

Limited English proficiency has the same meaning under this part as the ame term defined in 34 CFR 500.4 of he General Provisions regulations for he Bilingual Education Program.

uthority: 20 U.S.C. 3223(a)(1))

National origin desegregation means he assignment of students to public hools and within those schools withut regard to their national origin, inuding providing students of limited nglish proficiency with a full oppornity for participation in all educaonal programs.

uthority: 42 U.S.C. 2000c(b))

Public school means any elementary secondary educational institution operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from governmental sources.

(Authority: 42 U.S.C. 2000c(c))

Public school personnel means school board members and persons who are employed by or who work in the schools of a responsible governmental agency, as that term is defined in this section.

(Authority: 42 U.S.C. 2000c(c); 2000c-2000c-2, 2000c-5)

Race desegregation means the assignment of students to public schools and within those schools without regard to their race including providing students with a full opportunity for participation in all educational programs regardless of their race. "Race desegregation" does not mean the assignment of students to public schools to correct conditions of racial separation that are not the result of State or local law or official action.

(Authority: 42 U.S.C. 2000c(b))

Responsible governmental agency means any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools.

(Authority: 42 U.S.C. 2000c-2)

School board means any agency or agencies that administer a system of one or more public schools and any other agency that is responsible for the assignment of students to or within that system.

(Authority: 42 U.S.C. 2000c(d))

Sex desegregation means the assignment of students to public schools and within those schools without regard to their sex including providing students with a full opportunity for participation in all educational programs regardless of their sex.

(Authority: 42 U.S.C. 2000c(b))

§ 270.4 What types of projects are funded under these programs?

The Secretary may fund—

(a) State Educational Agency (SEAs) projects; and

(b) Desegregation Assistance Centers (DACs).

(Authority: 42 U.S.C. 2000c-2000c-2, 2000c-5)

§ 270.5 What stipends and related reimbursements are authorized under these programs?

(a) The recipient of an award under 34 CFR Parts 271 and 272 may pay:

(1) Stipends to public school personnel who participate in technical assistance or training activities funded under these parts for the period of their attendance, if the person to whom the stipend is paid receives no other compensation for that period; or

(2) Reimbursement to a responsible governmental agency that pays substitutes for public school personnel who:

(i) Participate in technical assistance or training activities funded under these parts; and

(ii) Are being compensated by that responsible governmental agency for the period of their attendance.

(b) A recipient may pay the stipends and reimbursements described in this section only if it demonstrates that the payment of these costs is necessary to the success of the technical assistance or training activity, and will not exceed 20 percent of the total award.

(c) If a recipient is authorized by the Secretary to pay stipends or reimbursements (or any combination of these payments), the recipient shall determine the conditions and rates for these payments in accordance with appropriate State policies, or in the absence of State Policies, in accordance with local policies.

(d) A recipient of a grant under 34 CFR Parts 271 and 272 may pay a travel allowance described in these parts only to a person who participates in a technical assistance or training activity.

(e) If the participant does not complete the entire scheduled activity, the recipient may pay the participant's transportation to his or her residence or place of employment only if the participant left the training activity because of circumstances not reasonably within his or her control.

(Authority: 42 U.S.C. 2000c-2000c-2, 2000c-5)

§ 270.6 What limitation is imposed on providing race and national origin desegregation assistance under these programs?

(a) Except as provided in paragraph (b) of this section, a recipient of a grant for race or national origin desegregation assistance under these programs may not use funds to assist in the development or implementation of activities or the development of curriculum materials for the direct instruction of students to improve their academic and vocational achievement levels.

(b) A recipient of a grant for national origin desegregation assistance under these programs may use funds to assist in the development and implementation of activities or the development of curriculum materials for the direct instructional of students of limited English proficiency, to afford these students a full opportunity to participate in all educational programs.

(Authority: 42 U.S.C. 2000c-2000c-2, 2000c-5)

PART 271—STATE EDUCATIONAL AGENCY DESEGREGATION PROGRAM

Subpart A—General

Sec.

271.1 What is the State Educational Agency Desegregation Program?
271.2 Who is eligible to apply for assistance under this program?
271.3 What regulations apply to this program?
271.4 What definitions apply to the program?

Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

271.10 What types of projects may be funded?
271.11 Who may receive desegregation assistance under this program?

Sec.

Subpart C—How Does An SEA Apply for a Grant?

271.20 What conditions must an applicant meet to obtain funding?

Subpart D—How Does the Secretary Make a Grant?

271.30 How does the Secretary evaluate an application?

271.31 How does the Secretary determine the amount of the grant?

AUTHORITY: 42 U.S.C. 2000c-2000c-2, 2000c-5, unless otherwise noted.

SOURCE: 52 FR 24964, July 1, 1987, unless otherwise noted.

Subpart A—General

§ 271.1 What is the State Educational Agency Desegregation Program?

This program provides grants to State educational agencies (SEAs) to enable them to provide technical assistance (including training) at the request of school boards and other responsible governmental agencies in the preparation, adoption, and implementation of plans for the desegregation of public schools and in the development of effective methods of coping with special educational problems occasioned by desegregation.

(Authority: 42 U.S.C. 2000c-2000c-2, 2000c-5)

§ 271.2 Who is eligible to apply for assistance under this program?

An SEA is eligible to apply for a grant under this program. An SEA shall submit one application to provide technical assistance in one, two, or all three of the desegregation assistance areas, as defined in 34 CFR 270.3.

(Authority: 42 U.S.C. 2000c-2)

§ 271.3 What regulations apply to this program?

The following regulations apply to the SEA program:

(a) The regulations in 34 CFR Part 270.

(b) The regulations in this part.

(Authority: 42 U.S.C. 2000c-2)

§ 271.4 What definitions apply to this program?

The definitions in 34 CFR Part 270.3 apply to the SEA program

(Authority: 42 U.S.C. 2000c-2)

Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

§ 271.10 What types of projects may be funded?

The Secretary awards grants to SEAs for projects offering technical assistance (including training) to school boards and other responsible governmental agencies, at their request, for desegregation assistance in the preparation, adoption, and implementation of desegregation plans. Desegregation assistance may include, among other activities:

(a) Dissemination of information regarding effective methods of coping with special educational problems occasioned by desegregation;

(b) Assistance and advice in coping with these problems; and

(c) Training designed to improve the ability of teachers, supervisors, counselors, parents, community members, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation.

(Authority: 42 U.S.C.3000c-2)

§ 271.11 Who may receive desegregation assistance under this program?

(a) A grantee may provide assistance only if the assistance is requested by a responsible governmental agency (other than the SEA) in its State.

(b) A grantee may provide assistance only to the following persons:

(1) Public school personnel.

(2) Students enrolled in public schools, parents of those students, and other community members.

(Authority: 42 U.S.C. 2000c-2)

Subpart C—How Does an SEA Apply for a Grant?

§ 271.20 What conditions must an applicant meet to obtain funding?

To obtain funding under this program:

(a) An applicant must demonstrate its leadership in facilitating desegregation (in each of the desegregation assistance areas for which it has applied) as indicated by policies and procedures adopted by the SEA to assist in the desegregation process;

(b) The applicant's project director must have access to the Chief State School Officer;

(c) The applicant must have a plan of the steps that it has taken or would take to inform the LEAs it will serve, public school personnel, students, and parents of the desegregation assistance available;

(d) The applicant must have familiarity with the desegregation-related needs and problems of the school boards and other responsible governmental agencies in its State;

(e) The assistance to be provided by the applicant must be designed to meet the desegregation needs (in each of the desegregation assistance areas for which it has applied) within its State;

(f) The applicant must identify specific desegregation problems that would be addressed by its proposed project;

(g) The applicant must have a plan for coordination with other related desegregation programs in its State, that will prevent duplication of assistance when a responsible governmental agency requests assistance from both the SEA and the DAC or other program;

(h) The applicant must provide a plan of operation for the proposed project that includes:

(1) An effective plan of management that ensures proper and efficient administration of the project;

(2) A clear description of how the objectives of the project relate to the purposes of the program;

(3) The way the applicant plans to use its resources and personnel to achieve each objective; and

(4) How the applicant will
that project participants who
erwise eligible to participate ar
ed without regard to race,
origin, color, sex, age, or handi
condition.

(i) The applicant must have f
ity with materials used in p
technical assistance and trai
each of the desegregation as
areas for which it has applied;

(j) The key personnel the a
plans to use on the project
qualified, as determined by:

(1) The experience and trai
the project director and other
sonnel; and

(2) The time that the projec
tor and other key personn
devote to the project to ensure
cess;

(k) The applicant, as part of
discriminatory employment p
shall ensure that its personnel
lected for employment without
to race, color, national origin,
age or handicapping condition.

(l) The project must have
quate budget to support the
activities, and costs must be r
ble in relation to the objectives
project; and

(m) The applicant must h
evaluation plan that includes m
of evaluation that are appropri
the project and, to the extent p
are objective and produce dat
are quantifiable.

(Approved by the Office of Man
and Budget under control numbe
0030)

(Authority: 42 U.S.C. 2000c-2)

Subpart D—How Does the Sec
Make a Grant?

§ 271.30 How does the Secretary
an application?

(a) The Secretary evaluates an
cation submitted under this p
the basis of the requireme
§ 271.20.

(b) The Secretary identifies
applications that satisfactorily
each of the factors includ
§ 271.20.

(c) The Secretary notifies a
whose application does not sati

rily address each of the requirements in § 271.20 and permits the SEA to amend its application. If the amended application meets each of the requirements of § 271.20, the Secretary approves it for funding.

(Authority: 42 U.S.C. 2000c-2)

§ 271.31 How does the Secretary determine the amount of the grant?

The Secretary awards a grant to each SEA whose application meets the requirements of § 271.20. The Secretary determines the amount of a grant, pursuant to the cost analysis under 34 CFR 75.232, on the basis of:

(a) The amount of funds available for all grants under this part;

(b) The magnitude of the expected needs of responsible governmental agencies for desegregation assistance and the cost of providing that assistance to meet those needs, in the State for which an application is approved, as compared with the magnitude of the expected needs for desegregation assistance, and the cost of providing it, in all States for which applications are approved for funding;

(c) The size and the racial or ethnic diversity of the student population of the State;

(d) The extent to which the applicant will effectively and efficiently use funds awarded to it, including, if relevant, consideration of its previous use of funds awarded under this program; and

(e) Any other information concerning desegregation problems and proposed activities that the Secretary finds relevant in the applicant's State.

(Authority: 42 U.S.C. 2000c-2)

PART 272—DESEGREGATION ASSISTANCE CENTER PROGRAM

Subpart A—General

Sec.
272.1 What is the Desegregation Assistance Center Program?
272.2 Who is eligible to receive a grant under this program?
272.3 What regulations apply to this program?
272.4 What definitions apply to this program?

Sec.

Subpart B—What Kinds of Activities Does the Secretary Fund Under This Program?

272.10 What type of projects may be funded?
272.11 Who may receive desegregation assistance under this program?
272.12 What geographic regions do the DACs serve?

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make a Grant?

272.30 What criteria does the Secretary use to make a grant?
272.31 How does the Secretary evaluate an application for a grant?
272.32 How does the Secretary determine the amount of a grant?

Subpart E—What Conditions Must Be Met by a Recipient of a Grant?

272.40 What conditions must be met by a recipient of a grant?

AUTHORITY: 42 U.S.C. 2000c-2000c-2, 2000c-5, unless otherwise noted.

SOURCE: 52 FR 24965, July 1, 1987, unless otherwise noted.

Subpart A—General

§ 272.1 What is the Desegregation Assistance Center Program?

This program provides financial assistance to operate regional Desegregation Assistance Centers (DACs), to enable them to provide technical assistance (including training) at the request of school boards and other responsible governmental agencies in the preparation, adoption, and implementation of plans for the desegregation of public schools, and in the development of effective methods of copying with special educational problems occasioned by desegregation.

(Authority: 42 U.S.C. 2000c-2)

§ 272.2 Who is eligible to receive a grant under this program?

A public agency (other than a State educational agency or a school board) or private, nonprofit organization is eligible to receive a grant under this program.

(Authority: 42 U.S.C. 2000c-2)

§ 272.3 What regulations apply to this program?

The following regulations apply to the DAC program:

(a) The regulations in 34 CFR Part 270.

(b) The regulations in this part.

(Authority: 42 U.S.C. 2000c-2)

§ 272.4 What definitions apply to this program?

The definitions in 34 CFR 270.3 apply to the DAC program.

(Authority: 42 U.S.C. 2000c-2)

Subpart B—What Kinds of Activities Does the Secretary Fund Under This Program?

§ 272.10 What types of projects may be funded?

(a) The Secretary may award funds to DACs for projects offering technical assistance (including training) to school boards and other responsible governmental agencies, at their request, for assistance in the preparation, adoption, and implementation of desegregation plans.

(b) A project must provide technical assistance in all three of the desegregation assistance areas, as defined in 34 CFR 270.3.

(c) Desegregation assistance may include, among other activities:

(1) Dissemination of information regarding effective methods of coping with special educational problems occasioned by desegregation;

(2) Assistance and advice in coping with these problems; and

(3) Training designed to improve the ability of teachers, supervisors, counselors, parents, community members, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation.

(Authority: 42 U.S.C. 2000c-2)

§ 272.11 Who may receive desegregation assistance under this program?

(a) The recipient of a grant under this part may provide assistance only if requested by school boards and other responsible governmental agencies located in its geographical ser
area.

(b) The recipient may provide as
ance only to the following persons:

(1) Public school personnel.

(2) Students enrolled in pu
schools, parents of those students,
other community members.

(Authority: 42 U.S.C. 2000c-2)

**§ 272.12 What geographic regions do
DACs serve?**

The Secretary awards a grant to p
vide race, sex, and national origin
segregation assistance under this p
gram in each of the following
graphic regions:

(a) Connecticut, Maine, Massac
setts, New Hampshire, Rhode Isla
Vermont.

(b) New York, New Jersey, Pue
Rico, Virgin Islands.

(c) Delaware, District of Columb
Maryland, Pennsylvania, Virgin
West Virginia.

(d) Alabama, Florida, Georgia, K
tucky, Mississippi, North Caroli
South Carolina, Tennessee.

(e) Illinois, Indiana, Michigan, M
nesota, Ohio, Wisconsin.

(f) Arkansas, Louisiana, New Mexi
Oklahoma, Texas.

(g) Iowa, Kansas, Missouri, Nebr
ka.

(h) Colorado, Montana, Nor
Dakota, South Dakota, Utah, Wy
ming.

(i) Arizona, California, Nevada.

(j) Alaska, American Samoa, Gua
Hawaii, Idaho, Northern Mariana
lands, Oregon, Trust Territory of t
Pacific Islands, Washington.

(Authority: 42 U.S.C. 2000c-2000c-2, 200
5)

Subpart C—[Reserved]

Subpart D—How Does the Secretary Make a Grant?

**§ 272.30 What criteria does the Secreta
use to make a grant?**

The Secretary uses the following cr
teria to evaluate applications for DA
grants.

(a) *Mission and strategy.* (30 poin
The Secretary reviews each applic

tion to determine the extent to which the applicant understands effective practices for addressing problems in each of the desegregation assistance areas, including the extent to which the applicant:

(1) Understands the mission of the proposed DAC;

(2) Is familiar with relevant research, theory, materials, and training models;

(3) Is familiar with the types of problems that arise in each of the desegregation assistance areas;

(4) Is familiar with relevant strategies for technical assistance and training; and

(5) Is familiar with the desegregation needs of responsible governmental agencies in its designated region.

(b) *Organizational capability.* (15 points) The Secretary reviews each application to determine the ability of the applicant to sustain a long-term, high-quality, and coherent program of technical assistance and training, including the extent to which the applicant:

(1) Demonstrates the commitment to provide the services of appropriate faculty or staff members from its organization;

(2) Selects project staff with an appropriate mixture of scholarly and practitioner backgrounds; and

(3) Has had past successes in rendering technical assistance and training in the desegregation assistance areas, including collaborating with other individuals and organizations.

(c) *Plan of operation.* (25 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including the extent to which:

(1) The design of the project is of high quality;

(2) The plan of management ensures proper and efficient administration of the project;

(3) The applicant plans to use its resources and personnel effectively to achieve each objective; and

(4) The applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, sex, age, or handicapping condition.

(d) *Quality of key personnel.* (15 points)

(1) The Secretary reviews each application to determine the qualifications of the key personnel that the applicant plans to use on the project, including:

(i) The qualifications of the project director;

(ii) The qualifications of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (d)(1) (i) and (ii) of this section will commit to the project; and

(iv) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or handicapping condition.

(2) To determine personnel qualifications, under paragraphs (d)(1) (i) and (ii) of this section, the Secretary considers:

(i) Experience and training in fields related to the objectives of the project; and

(ii) Any other qualifications that pertain to the quality of the project.

(e) *Budget and cost effectiveness.* (5 points) The Secretary reviews each application to determine the extent to which:

(1) The budget for the project is adequate to support the project activities; and

(2) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan.* (5 points) The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the methods of evaluation:

(1) Are appropriate for the project; and

(2) To the extent possible, are objective and produce data that are quantifiable.

(g) *Adequacy of resources.* (5 points) The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

(Approved by the Office of Management and Budget under control number 1810-0517)

(Authority: 42 U.S.C. 2000c-2)

§ 272.31 How does the Secretary evaluate an application for a grant?

(a) The Secretary evaluates the application on the basis of the criteria in § 272.30.

(b) The Secretary selects the highest ranking application for each geographical service area to receive a grant.

(Authority: 42 U.S.C. 2000c-2)

§ 272.32 How does the Secretary determine the amount of a grant?

The Secretary determines the amount of a grant on the basis of:

(a) The amount of funds available for all grants under this part;

(b) A cost analysis of the project (that shows whether the applicant will achieve the objectives of the project with reasonable efficiency and economy under the budget in the application), by which the Secretary:

(1) Verifies the cost data in the detailed budget for the project;

(2) Evaluates specific elements of costs; and

(3) Examines costs to determine if they are necessary, reasonable, and allowable under applicable statutes and regulations;

(c) The magnitude of the expected needs or responsible governmental agencies for desegregation assistance in the geographic region, and the cost of providing that assistance to meet those needs, as compared with the magnitude of the expected needs for desegregation assistance, and the cost of providing it, in all geographic regions for which applications are approved for funding;

(d) The size and the racial or ethnic diversity of the student population of the geographic region for which the DAC will provide services; and

(e) Any other information concerning desegregation problems and proposed activities that the Secretary finds relevant in the applicant's geographic region.

(Authority: 42 U.S.C. 2000c-2)

Subpart E—What Conditions Must B Met by a Recipient of a Grant?

§ 272.40 What conditions must be met a recipient of a grant?

A recipient of a grant under th part must:

(a) Operate a DAC in the geograph region to be served;

(b) Have a full-time project directo and

(c) Coordinate assistance in its ge graphic region with appropriate SE funded under 34 CFR Part 271. part of this coordination, the recipie shall develop plans to prevent duplic tion of assistance when a responsib governmental agency requests assi ance from both the DAC and the a propriate SEA.

(Authority: 42 U.S.C. 2000c-2)

PART 280—MAGNET SCHOOLS ASSISTANCE PROGRAM

Subpart A—General

Sec.
280.1 What is the Magnet Schools Assi ance Program?
280.2 Who is eligible to apply for a gra
280.3 What regulations apply to this pr gram?
280.4 What definitions apply to this pr gram?

Subpart B—What Types of Projects Does th Secretary Assist under This Program?

280.10 What types of projects does the Se retary assist?

Subpart C—How Does One Apply for a Gra

280.20 How does one apply for a grant?

Subpart D—How Does the Secretary Make Grant?

280.30 How does the Secretary evaluate application?
280.31 What selection criteria does th Secretary use?
280.32 How is special consideration giv to applicants?
280.33 How does the Secretary select ap cations for new grants with funds ap priated in excess of $75 million?
280.34 How does the Secretary approve continuation award?

Sec.

Subpart E—What Conditions Must Be Met by a Grantee?

280.40 What costs are allowable?
280.41 What are the limitations on allowable costs?
280.42 What is the limitation on the amount of a grant an LEA may carry over into the next fiscal year?

Subpart F—May a State Reduce Aid to an LEA That Receives a Grant Under This Program?

280.50 May a State reduce the amount of aid it gives to an LEA?

AUTHORITY: 20 U.S.C. 3021-3032, unless otherwise noted.

Subpart A—General

§ 280.1 What is the Magnet Schools Assistance Program?

The Magnet Schools Assistance Program provides grants to eligible local educational agencies (LEAs) for use in magnet schools that are part of an approved desegregation plan and that are designed to bring students from different social, economic, ethnic and racial backgrounds together. The purposes of the program are to support, through financial assistance to eligible LEAs,:

(a) The elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial portions of minority students; and

(b) Courses of instruction within magnet schools that will substantially strengthen the knowledge of academic subjects and the grasp of tangible and marketable vocational skills of students attending such schools.

(20 U.S.C. 3023)

[51 FR 20414, June 4, 1986, as amended at 54 FR 19509, May 5, 1989]

§ 280.2 Who is eligible to apply for a grant?

An LEA is eligible to receive assistance under this part if the LEA meets any of the following requirements:

(a) The LEA is implementing a plan undertaken pursuant to a final order of a court of the United States, or a court of any State, or any other State agency or official of competent jurisdiction, and the order requires the desegregation of minority group segregated children or faculty in the elementary and secondary schools of that agency.

(b) The LEA adopted and is implementing on either a voluntary basis or as required under Title VI of the Civil Rights Act of 1964—or will adopt and implement if assistance is made available under this part—a plan that has been approved by the Secretary as adequate under Title VI.

(Authority: 20 U.S.C 3022)

[50 FR 21191, May 22, 1985, as amended at 54 FR 19508, May 5, 1989]

§ 280.3 What regulations apply to this program?

The following regulations apply to the Magnet Schools Assistance Program:

(a) The Education Department General Administrative Regulations (EDGAR), 34 CFR Parts 75 (Direct grant programs), except that § 75.253(c) (relating to reducing a subsequent year's award by the amount remaining available from the grantee's current award) does not apply to this program, 77 (Definitions apply to Department regulations), 79 (Intergovernmental Review of Department of Education programs and activities), 80 (Uniform Administrative Requirements for State and Local Governments), and 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(b) The regulations in this part.

(Authority: 20 U.S.C. 3021-3032)

[50 FR 21191, May 22, 1985, as amended at 54 FR 19508, May 5, 1989]

§ 280.4 What definitions apply to this program?

(a) *Definitions in EDGAR:* The following terms used in this part are defined in 34 CFR Part 77:

Applicant
Application
Award
Budget
EDGAR
Elementary school
Equipment

Facilities
Fiscal year
Grant
Local educational agency
Project
Secondary school
Secretary
State
Supplies

(b) *Definitions that apply to this program:* The following definitions also apply to this part:

Act means Title VII of the Education for Economic Security Act, Pub. L. 98-377.

Community-based organization means a private nonprofit organization that—

(1) Is representative of a community or a significant segment of a community and

(2) Provides educational or related services to individuals in the community.

(Authority: 20 U.S.C. 2891(3))

Desegregation, in reference to a plan, means a plan for the reassignment of children or faculty to remedy the illegal separation of minority group children or faculty in the schools of an LEA or a plan for the reduction, elimination, or prevention of minority group isolation in one or more of the schools of an LEA.

Implementation date means the date of the first change in the enrollment of a school as a result of the desegregation plan or a modification of the plan, or, in the case of a plan for the desegregation of minority group segregated faculty, the first reassignment of a faculty member as a result of the plan or a modification of the plan.

Institution of higher education has the same meaning as in section 1201(a) of the Higher Education Act of 1965, as implemented in 34 CFR § 600.4(a).

(Authority: 20 U.S.C. 2891(10))

Magnet school means a school or education center that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds.

Minority group means the following:

(1) *American Indian or Alaskan Native.* A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation community recognition.

(2) *Asian of Pacific Islander.* person having origins in any of th original peoples of the Far Eas Southeast Asia, the Indian subcont nent, or the Pacific Islands. This are includes, for example, China, Indi Japan, Korea, the Philippine Island and Samoa.

(3) *Black (Not of Hispanic Origin* A person having origins in any of th black racial groups of Africa.

(4) *Hispanic.* A person of Mexican Puerto Rican, Cuban, Central o South American, or other Spanish culture or origin, regardless of race.

Minority group isolation, in reference to a school, means a condition i which minority group children constitute more than 50 percent of the enrollment of the school.

Special curriculum means a course of study embracing subject matter or teaching methodology that is not generally offered to students of the same age or grade level in the same LEA, as the students to whom the special curriculum is offered in the magnet schools. This term does not include:

(1) A course of study or a part of a course of study designed solely to provide basic educational services to handicapped students or to students of limited English-speaking ability;

(2) A course of study or a part of a course of study in which any student is unable to participate because of his or her limited English-speaking ability;

(3) A course of study or a part of a course of study in which any student is unable to participate because of his or her limited financial resources; or

(4) A course of study or a part of a course of study that fails to provide for a participating student's meeting the requirements for completion of elementary or secondary education in the same period as other students enrolled in the applicant's schools.

(Authority: 20 U.S.C. 3021-3032)

[50 FR 21191, May 22, 1985, as amended a 51 FR 20414, June 4, 1986; 54 FR 19508 and 19509, May 5, 1989]

Subpart B—What Types of Projects Does the Secretary Assist Under This Program?

§ 280.10 What types of projects does the Secretary assist?

(a) The Secretary funds applications proposing projects in magnet schools that are part of an approved desegregation plan and that are designed to bring students from different social, economic, ethnic, and racial backgrounds together.

(b) For the purposes of this part, an approved desegregation plan is a desegregation plan described in § 280.2 (a) or (b).

(c) In the case of a desegregation plan described in § 280.2(a), any modification to that plan must be approved by the court, agency, or official that approved the plan.

(Authority: 20 U.S.C. 3024)

[50 FR 21191, May 22, 1985, as amended at 51 FR 20414, June 4, 1986; 54 FR 19508 and 19509, May 5, 1989]

Subpart C—How Does One Apply for a Grant?

§ 280.20 How does one apply for a grant?

(a) Each eligible LEA that desires to receive assistance under this part shall submit an annual application to the Secretary.

(b) In its application, the LEA shall provide assurances that it:

(1) Will use funds made available under this part for the purposes specified in Section 3003 of the Act;

(2) Will employ teachers in the courses of instruction assisted under this part who are certified or licensed by the State to teach the subject matter of the course of instruction;

(3) Will not engage in discrimination based upon race, religion, color, national origin, sex, or handicap in the hiring, promotion, or assignment of employees of the agency or other personnel for whom the agency has any administrative responsibility;

(4) Will not engage in discrimination based upon race, religion, color, national origin, sex, or handicap in the mandatory assignment of students to schools or to courses of instruction within schools of the agency except to carry out the approved desegregation plan;

(5) Will not engage in discrimination based upon race, religion, color, national origin, sex, or handicap in designing or operating extracurricular activities for students; and

(6) Will carry out a high quality education program that will encourage greater parental decisionmaking and involvement.

(c) In addition to the assurances listed in paragraph (b) of this section, the LEA shall provide such other assurances as the Secretary determines necessary to carry out the provisions of this part.

(d) Upon request, the LEA shall submit any information that is necessary for the Assistant Secretary for Civil Rights to determine whether the assurances required in paragraphs (b) (3), (4), and (5) of this section will be met.

(e) An LEA that has an approved desegregation plan shall submit each of the following with its application:

(1) A copy of the plan.

(2) An assurance that the plan is being implemented as approved.

(f) An LEA that does not have an approved desegregation plan shall submit each of the following with its application:

(1) A copy of the plan the LEA is submitting for approval.

(2) A copy of a school board resolution or other evidence of final official action adopting and implementing the plan, or agreeing to adopt and implement it upon the award of assistance under this part.

(3) Evidence that the plan is a desegregation plan as defined in § 280.4(b).

(g) In addition to including the assurances required by this section, an LEA shall describe in its application—

(1) How assistance made available under this part will be used to promote desegregation; and

(2) The manner in which the LEA will continue the magnet schools program after assistance under this program is no longer available.

(Approved by the Office of Management and Budget under control number 1810-0516)

(Authority: 20 U.S.C. 3027)

[50 FR 21191, May 22, 1985, as amended at 54 FR 19508 and 19509, May 5, 1989]

Subpart D—How Does the Secretary Make a Grant?

§ 280.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application submitted under this part on the basis of the criteria in § 280.31 and the special consideration factors in § 280.32.

(b) The Secretary awards up to 100 points for the extent to which an application meets the criteria described in § 280.31. The maximum possible points for each complete criterion are indicated in parentheses after the heading for that criterion.

(c) The Secretary then awards up to 45 additional points based upon the special consideration factors in § 280.32.

(Authority: 20 U.S.C. 3021-3032)

[50 FR 21191, May 22, 1985]

§ 280.31 What selection criteria does the Secretary use?

The Secretary uses the following selection criteria in evaluating each application:

(a) *Plan of operation.* (20 points) (1) The Secretary reviews each application for information that shows the quality of the plan of operation for the project.

(2) The Secretary looks for information that shows:

(i) An effective plan of management that ensures proper and efficient administration of the project;

(ii) A clear description of how the objectives of the project relate to the purposes of the program;

(iii) The way the applicant plans to use its resources and personnel to achieve each objective;

(iv) A clear description of how the applicant will provide equal access and treatment for eligible project participants who are members of groups that have been traditionally underrepresented, such as:

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly; and,

(v) How assistance made available under this program will be used to promote desegregation.

(b) *Quality of key personnel.* (20 points) (1) The Secretary reviews each application for information that shows the qualifications of the key personnel the applicant plans to use on the project.

(2) The Secretary looks for information that shows:

(i) The qualifications of the project director (if one is to be used);

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (b)(2) (i) and (ii) of this section will commit to the project; and

(iv) How the applicant, as part of its nondiscriminatory employment practices will ensure that its personnel are selected for employment without regard to race, religion, color, national origin, sex, age, or handicap.

(3) To determine personnel qualifications, the Secretary considers experience and training in fields related to the objectives of the project, as well as other information that the applicant provides.

(c) *Quality of project design.* (35 points) (1) The Secretary reviews each application for information that shows the quality of the project design.

(2) The Secretary looks for information that shows:

(i) The extent to which the design of the magnet school(s) is likely to bring students from different social, economic, ethnic, and racial backgrounds together;

(ii) The applicant's and the staff's experience in and knowledge of curriculum development and desegregation strategies; and

(iii) How the magnet school(s) will:

(A) Address educational needs that are appropriate to the students who will be enrolled in the magnet school(s); and

(B) Carry out a high quality educational program that will encourage greater parental decisionmaking and involvement.

(d) *Budget and cost effectiveness.* (5 points) (1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows:

(i) The budget for the project is adequate to suppport the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(e) *Evaluation plan.* (15 points) (1) The Secretary reviews each application for information that shows the quality of the evaluation plan for the project. (See 34 CFR 75.590, Evaluation by the grantee.)

(2) The Secretary looks for information that shows methods of evaluation that are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable.

(f) *Adequacy of resources.* (5 points) (1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the project.

(2) The Secretary looks for information that shows:

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(g) *Commitment and capacity.* (10 points) (1) The Secretary reviews each application for information that shows how the applicant will continue the magnet schools program after assistance under this part is no longer available.

(2) The Secretary looks for information that shows the applicant's—

(i) Commitment to the magnet schools program; and

(ii) Plan for gradual assumption of program costs.

(Approved by the Office of Management and Budget under control number 1810-0516)

(Authority: 20 U.S.C. 3021-3032)

[50 FR 21191, May 22, 1985, as amended at 54 FR 19508, Dec. 5, 1989; 54 FR 21164, May 16, 1989]

§ 280.32 How is special consideration given to applicants?

(a) *How special consideration is given.* In addition to the points awarded under § 280.31, the Secretary gives special consideration to the factors listed in paragraphs (b) through (f) of this section. The maximum number of points awarded for each factor is stated in parentheses.

(b) *The recentness of the implementation of the approved desegregation plan.* (10 points)

(1) The Secretary reviews each application to determine the recentness of the implementation date of the approved desegregation plan or modification of the plan.

(2) The Secretary determines the recentness of the plan by assigning each application to one of the following categories:

(i) Applications based on plans or modifications of plans with implementation dates not more than five years before the July 1 that follows the deadline date for applications. (10 points)

(ii) Applications based on plans or modifications of plans with implementation dates more than five years but not more than ten years before the July 1 that follows the deadline date for applications. (7 points)

(iii) Applications based on plans or modifications of plans with implementation dates more than ten years but not more than fifteen years before the July 1 that follows the deadline date for applications. (4 points)

(iv) Applications based on plans or modifications of plans with implementation dates more than fifteen years before the July 1 that follows the deadline date for applications. (0 points)

(c) *Involvement of minority group children.* (10 points)

(1) The Secretary gives special consideration to the proportion of minority group children involved in the approved desegregation plan.

(2) The Secretary determines the percentage that represents a comparison of the number of minority group children involved in the applicant's approved desegregation plan to the

number of minority group children enrolled in the applicant's schools.

(3) The Secretary awards one point for each ten percentage points the applicant receives under paragraph (c)(2) of this section.

(d) *Need for assistance.* (15 points) The Secretary reviews the application to determine the need for assistance based on the incremental expense of implementing the approved desegregation plan (expressed as a percentage increase in an LEA's operating budget) or the difficulty of effectively carrying out the plan and the project for which assistance is sought. The applicant receives up to 15 points, depending on the extent of need for assistance.

(e) *Degree of achievement.* (10 points)

The Secretary reviews each application to determine the degree to which the program or project for which assistance is sought affords promise of achieving the purposes of this part as listed in § 280.1.

(Authority: 20 U.S.C. 4051-4062)

(f) *Collaborative efforts.* The Secretary determines the degree to which the program or project for which assistance is sought involves the collaborative efforts of institutions of higher education, community-based organizations, the appropriate State educational agency, or any other private organization.

(Approved by the Office of Management and Budget under control number 1810-0516)

(Authority: 20 U.S.C. 3028(b))

[50 FR 21191, May 22, 1985, as amended at 54 FR 19508, May 5, 1989]

§ 280.33 How does the Secretary select applications for new grants with funds appropriated in excess of $75 million?

(a) In selecting among applicants for funds appropriated for this program in excess of $75 million, the Secretary first identifies those remaining applicants that did not receive funds under this program in the last fiscal year of the previous funding cycle.

(b) The Secretary then awards ten additional points to each applicant identified under paragraph (a) of this section.

(Authority: 20 U.S.C. 3021(b)(1))

[54 FR 19509, May 5, 1989]

§ 280.34 How does the Secretary approve a continuation award?

The Secretary approves a continuation award only if:

(a) The applicant is making satisfactory progress toward achieving the purposes of this part; and

(b) The conditions in 34 CFR 75.253(a) have been met.

(Authority: 20 U.S.C. 3030(a))

[50 FR 21191, May 22, 1985. Redesignated and amended at 54 FR 19509, May 5, 1989]

Subpart E—What Conditions Must Be Met by a Grantee?

§ 280.40 What costs are allowable?

An LEA may use funds received under this part for the following activities:

(a) Planning and promotional activities directly related to the expansion, continuation, or enhancement of academic programs and services offered at magnet schools, though planning activities are subject to the restriction in § 280.41(a).

(b) The acquisition of books, materials, and equipment (including computers) and the maintenance and operation thereof. Any books, materials or equipment purchased with grant funds must be:

(1) Necessary for the conduct of programs in magnet schools; and

(2) Directly related to improving the knowledge of mathematics, science, history, English, foreign languages, art, or music, or to improving vocational skills.

(c) The payment or subsidization of the compensation of elementary and secondary school teachers:

(1) Who are certified or licensed by the State;

(2) Who are necessary to conduct programs in magnet schools; and

(3) Whose employment is directly related to improving the knowledge of mathematics, science, history, English, foreign languages, art, or music, or to improving vocational skills.

(Authority: 20 U.S.C. 3026)

[51 FR 20414, June 4, 1986, as amended at 54 FR 19509, May 5, 1989]

§280.41 What are the limitations on allowable costs?

An LEA that receives assistance under this part may not:

(a) Expend more than 10 percent of the funds received in any fiscal year for planning;

(b) Use funds for consultants or transportation; or

(c) Use funds for any activity that does not augment academic improvement.

(Approved by the Office of Management and Budget under control number 1810-0516)

(Authority: 20 U.S.C. 3029, 3030(b))

[50 FR 21191, May 22, 1985, as amended at 51 FR 20414, June 4, 1986; 54 FR 19509, May 5, 1989]

§280.42 What is the limitation on the amount of a grant an LEA may carry over into the next fiscal year?

(a) An LEA may not carry over more than 15 percent of its grant award into a subsequent fiscal year.

(b) The Secretary does not apply the limitation in paragraph (a) of this section to an award under the Magnet Schools Assistance Program that is not made in a timely manner.

(c) In determining whether an award was made in a timely manner, the Secretary considers, given the date of the award, the grantee's ability to carry out grant activities during the grant period without carrying over more than 15 percent of its grant into a subsequent grant period.

(Authority: 20 U.S.C. 3031(a)(2))

[54 FR 19509, May 5, 1989]

Subpart F—May a State Reduce Aid to an LEA That Receives a Grant Under This Program?

§280.50 May a State reduce the amount of aid given an LEA?

No State may reduce the amount of State aid with respect to the provision of free public education or the amount of assistance received under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965, as amended, in any school district of any local educational agency within the State because of assistance made or to be made available to that agency under this part.

(Authority: 20 U.S.C. 3030(c))

[54 FR 19509, May 5, 1989]

PART 298—FEDERAL, STATE, AND LOCAL PARTNERSHIP FOR EDUCATIONAL IMPROVEMENT

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AUTHORITY: 20 U.S.C. 2911-2952, 2971-2976, unless otherwise noted.

SOURCE: 55 FR 14811, Apr. 18, 1990, unless otherwise noted.

Subpart A—How a State or Local Educational Agency Obtains Funds

§ 298.1 Purpose.

Under the Federal, State, and Local Partnership for Educational Improvement program (referred to in this part as the chapter 2 program), the Secretary provides Federal financial assistance to State and local educational agencies to—

(a) Provide the initial funding to implement promising educational programs that can be supported with State and local funds after those programs have been demonstrated to be effective;

(b) Provide a continuing source of innovation, educational improvement, and support for library and instructional materials;

(c) Meet the special educational needs of at-risk and high-cost students;

(d) Enhance the quality of teaching and learning through initiating and expanding effective schools programs; and

(e) Meet their educational needs and priorities for targeted assistance.

(Authority: 20 U.S.C. 2911(b))

§ 298.2 Applicable regulations.

(a) The following regulations apply to the chapter 2 program:

(1) The Education Department General Administrative Regulations (EDGAR) as follows:

(i) 34 CFR part 76 (State-Administered Programs) as follows:

(A) Subpart A (General), except for § 76.3 (ED general grant regulations apply to these programs).

(B) Sections 76.125-76.137 (Consolidated Grant Applications for Insular Areas).

(C) Section 76.401 (Disapproval of an application—opportunity for a hearing).

(D) Subpart F (What Conditions Must Be Met by the State and Its Subgrantees?) as follows:

(*1*) Section 76.500 (Federal statutes and regulations on nondiscrimination).

(*2*) Section 76.532 (Use of funds for religion prohibited).

(*3*) Section 76.533 (Acquisition real property; construction).

(*4*) Section 76.534 (Use of tuition an fees restricted).

(*5*) Section 76.563 (Restricted ind rect cost rate—programs covered).

(*6*) Section 76.592 (Federal evalua tion—satisfying requirement for Stat or subgrantee evaluation).

(*7*) 34 CFR 75.601-75.602, 75.609 75.611, 75.613, and 75.616 concernin construction authorized unde § 298.37(b), incorporated by referenc in § 76.600.

(*8*) Sections 76.670-76.677 (Proce dures for Bypass).

(*9*) Section 76.682 (Treatment of ani mals).

(E) Subpart G (What Are the Ad ministrative Responsibilities of the State and Its Subgrantees?) as follows

(*1*) Section 76.703 (When a State may begin to obligate funds).

(*2*) Section 76.704 (When certain subgrantees may begin to obligate funds).

(*3*) Section 76.705 (Funds may be obligated during a "carryover period").

(*4*) Section 76.706 (Obligations made during a carryover period are subject to current statutes, regulations, and applications).

(*5*) Section 76.707 (When obligations are made).

(*6*) Section 76.730 (Records related to grant funds).

(*7*) Section 76.734 (Record retention period).

(*8*) Section 76.740 (Protection of and accessibility to student records).

(*9*) Section 76.760 (More than one program may assist a single activity).

(*10*) Section 76.783 (State educational agency action—subgrantee's opportunity for a hearing).

(F) Section 76.901 (Education Appeal Board).

(ii) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(iii) 34 CFR part 78 (Education Appeal Board).

(iv) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(v) 34 CFR part 82 (New Restrictions on Lobbying).

(vi) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide

Requirements for Drug-Free Workplace (Grants)).

(2) The regulations in this part 298.

(b)(1) A State shall have fiscal and administrative requirements for expending and accounting for all funds received by SEAs and LEAs under this part. These requirements must be available for Federal inspection and must—

(i) Be sufficiently specific to ensure that funds received under this part are used in compliance with all applicable statutory and regulatory provisions;

(ii) Ensure that funds received under this part are only spent for reasonable and necessary costs of operating programs under this part; and

(iii) Ensure that funds received under this part are not used for general expenses required to carry out other responsibilities of State and local governments.

(2) A State may satisfy this requirement by—

(i) Using fiscal and administrative requirements applicable to the use of its own funds;

(ii) Adopting new fiscal and administrative requirements; or

(iii) Applying the provisions in 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments) and in 34 CFR 75.603-75.608, 75.612, 75.614, and 75.615 (concerning construction authorized under § 298.37(b)).

(Authority: 20 U.S.C. 2911-2952, 2971-2976)

§ 298.3 Definitions.

(a) *Definition in the Elementary and Secondary Education Act of 1965.* The following terms used in this part are defined in section 1471 of the Act:

Construction
Elementary school
Equipment
Free public education
Local educational agency (LEA)
Parent
Pupil services
Pupil services personnel
School facilities
Secondary School
Secretary
State
State educational agency (SEA)

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Application
EDGAR
Fiscal year
Grant
Minor remodeling
Nonprofit
Private
Public

(c) *Other definitions.* The following definitions also apply to this part:

Act means the Elementary and Secondary Education Act of 1965, as amended (ESEA).

Chapter 2 means chapter 2 of title I of the Act.

(Authority: 20 U.S.C. 2891, 2911-2952, 2971-2976)

§ 298.4 State advisory committee.

(a) Any State that desires to receive a grant under this part shall establish an advisory committee that meets the requirements in section 1522(a)(2) of the Act.

(b) An existing organization may be the advisory committee for the purpose of paragraph (a) of this section if the organization—

(1) Is not the SEA under State law;

(2) Is appointed by the Governor to be the advisory committee; and

(3) Meets the representation requirements of section 1522(a)(2) of the Act.

(c) The State advisory committee advises the SEA on—

(1) The allocation among targeted programs under § 298.12 of funds reserved for State use under section 1512(a) of the Act;

(2) The formula for the allocation of funds to LEAs; and

(3) The planning, development, support, implementation, and evaluation of State programs assisted under this part.

(Authority: 20 U.S.C. 2932(a) (2))

§ 298.5 State applications.

(a)(1) Any State that desires to receive a grant under this part shall submit an application to the Secretary that meets the requirements in section 1522 of the Act.

(2) The application may be submitted in any form that the State determines is appropriate.

(b)(1) A State shall file its chapter 2 application for a period not to exceed three years.

(2) If a State that submits an application covering more than one year makes any substantial changes in its application, the State shall—

(i) File a new application; or

(ii) Annually amend its current application to reflect those changes.

(Approved by the Office of Management and Budget under control number 1810-0053)

(Authority: 20 U.S.C. 2932)

§ 298.6 LEA applications.

(a) An LEA may receive its allocation of funds under this part for any year for which—

(1) The LEA has an application on file with the SEA; and

(2) The SEA has certified that the application meets the requirements in section 1533(a) of the Act.

(b)(1) An LEA shall file its application for a period not to exceed three years.

(2) If an LEA that submits an application covering more than one year makes any substantial changes in its application, the LEA shall—

(i) File a new application; or

(ii) Annually amend its current application to reflect those changes.

(c) In addition to the other requirements in section 1533(a) of the Act, an LEA's application must provide for systematic consultation, in the allocation of funds for programs authorized by chapter 2 and in the design, planning, and implementation of those programs, with—

(1) Parents of children attending public and private elementary and secondary schools in the area served by the LEA;

(2) Teachers and administrative personnel in those schools; and

(3) Other groups involved in the implementation of chapter 2 (such as librarians, school counselors, school social workers, school psychologists, and other pupil services personnel) as the LEA deems appropriate.

(d) An LEA may apply for chapter 2 funds by itself or with a consortium of LEAs.

(Approved by the Office of Management and Budget under control number 1810-0053)

(Authority: 20 U.S.C. 2943)

§ 298.7 Allocation of chapter 2 funds to LEAs.

(a) An SEA shall distribute to each LEA that has submitted an application as required in § 298.6 the amount of its allocation as determined under paragraph (b) of this section.

(b)(1) From the funds made available to an SEA each year under this part, the SEA shall distribute not less than 80 percent to LEAs within the State according to the relative enrollments in public and private, nonprofit schools within the school districts of those agencies.

(2) The SEA shall—

(i) Calculate relative enrollments within each LEA on the basis of the total number of children enrolled for the fiscal year preceding the fiscal year in which the determination is made in—

(A) Public schools in the LEA; and

(B) Private, nonprofit schools in the LEA that desire that their children participate in chapter 2 programs; and

(ii) Adjust those relative enrollments, in accordance with criteria approved by the Secretary under paragraph (d) of this section, to provide higher per pupil allocations only to LEAs that serve the greatest numbers or percentages of—

(A) Children living in areas with high concentrations of low-income families;

(B) Children from low-income families; or

(C) Children living in sparsely populated areas.

(c) The State shall include in its application under § 298.5 the following information concerning adjustments under paragraph (b)(2)(ii) of this section:

(1) How the State adjusted its formula.

(2) How the children under paragraph (b)(2)(ii) of this section are defined.

(3) The basis on which the State determined which LEAs serve the greatest numbers or percentages of the children described in paragraph (b)(2)(ii) of this section.

(4) The percentage of the funds for LEAs that the State proposes to allot on an adjusted basis.

(d) The Secretary reviews and approves the State's criteria for adjusting allocations to LEAs if the criteria are reasonably calculated to produce an adjusted allocation that reflects the relative needs within the State's LEAs based on the factors contained in paragraph (b)(2)(ii) of this section.

(Approved by the Office of Management and Budget under control number 1810-0053)

(Authority: 20 U.S.C. 2922)

§ 298.8 Reallocation.

(a) An SEA reallocate to other LEAs chapter 2 funds—

(1) From an LEA that—

(i) Does not participate in the chapter 2 program; or

(ii) Has chapter 2 funds that exceed the amount required to—

(A) Operate its chapter 2 projects during the current fiscal year in accordance with its approved application; and

(B) Provide a prudent and justifiable reserve of chapter 2 funds for operating its chapter 2 projects effectively during the next fiscal year; or

(2) That are recovered by the State based on a determination by the State that the LEA has failed to spend LEA chapter 2 funds in accordance with applicable law.

(b) A reallocation of funds under this section—

(1) May be made only during the fiscal year for which the funds were appropriated or during the succeeding fiscal year;

(2) Must be made in accordance with the purposes of chapter 2; and

(3) Must be spent in accordance with the requirements in chapter 2 and the regulations in this part.

(Authority: 20 U.S.C. 2922)

§§ 298.9—298.10 [Reserved]

Subpart B—Project Requirements That a State or Local Educational Agency Must Meet

§ 298.11 General responsibilities of State and local education agencies.

(a) *State educational agencies.* (1)(i) Except as provided in paragraph (a)(1)(ii) of this section, an SEA has the basic responsibility for the administration and supervision of programs assisted with chapter 2 funds. This responsibility must be carried out with a minimum of paperwork.

(ii) Apart from providing technical and advisory assistance and monitoring compliance with chapter 2, an SEA may not exercise any influence in the decisionmaking processes of an LEA concerning the expenditures described in the LEA's application.

(2) To carry out its responsibilities, an SEA may, in accordance with State law, issue rules, regulations, or policies relating to the administration and operation of programs funded under this part provided that those rules, regulations, or policies do not conflict with the provisions of—

(i) Chapter 2;

(ii) The regulations in this part, including the discretion granted to SEAs under paragraph (b) of this section; or

(iii) Other applicable Federal statutes and regulations.

(b) *Local educational agencies.* (1) An LEA has complete discretion, subject only to the limitations and requirements of chapter 2, in determining how funds the agency receives under section 1512 of the Act are distributed among the areas of targeted assistance in accordance with the LEA's chapter 2 application.

(2) In exercising this discretion, the LEA shall ensure that each expenditure of chapter 2 funds—

(i) Carries out the purposes of chapter 2; and

(ii) Meets the educational needs within the schools of that LEA.

(Authority: 20 U.S.C. 2911(c), 2932, 2943(c))

§ 298.12 Targeted assistance programs.

(a) Consistent with paragraph (b) of this section, chapter 2 funds may be used for the planning, development, operation, and expansion of the following:

(1) Programs to meet the educational needs of—

(i) Students at risk of failure in school;

(ii) Students at risk of dropping out of school; and

(iii) Students for whom providing an education entails higher than average costs.

(2) Programs for the acquisition and use of instructional and educational materials, including library books, reference materials, computer software and hardware for instructional use, and other curricular materials that would be used to improve the quality of instruction.

(3) Innovative programs designed to carry out schoolwide improvements, including effective schools programs under sections 1541-1542 of the Act.

(4) Programs of training and professional development to enhance the knowledge and skills of educational personnel, including teachers, librarians, school counselors, school social workers, school psychologists and other pupil services personnel, and administrators and school board members.

(5) Programs designed to enhance personal excellence of students and student achievement, including instruction in ethics, performing and creative arts, humanities, activities in physical fitness and comprehensive health education, and participation in community service projects.

(6) Innovative projects to enhance the educational program and climate of the school, including programs for gifted and talented students, technology education programs, early childhood education programs, community education and programs for youth suicide prevention.

(b) Except to purchase computer hardware for instructional purposes under section 1531(b)(2) of the Act, chapter 2 funds may not be used to purchase instructional equipment unless that instructional equipment is used as a part of a program under paragraph (a) of this section.

(c) In conducting targeted assistance programs under this section, an SEA or LEA may use chapter 2 funds to make grants to and to enter into contracts with LEAs, institutions of higher education, libraries, museums, and other public and private nonprofit agencies, organizations, and institutions.

(Authority: 20 U.S.C. 2941-2942, 2951-2952)

§ 298.13 Use of funds by SEAs.

(a) *Authorized activities.* An SEA may use chapter 2 funds reserved for State use only for—

(1) State administration of chapter 2 programs, subject to paragraph (b)(1) of this section, including—

(i) Supervising the allocation of chapter 2 funds to LEAs;

(ii) Planning, supervising, and processing chapter 2 funds reserved for State use;

(iii) Monitoring and evaluating chapter 2 programs and activities; and

(iv) Operating the State advisory committee.

(2) Assistance to LEAs to provide targeted assistance under § 298.12 in the form of—

(i) Direct grants to LEAs;

(ii) Statewide activities; and

(iii) Technical assistance.

(3) Assistance to LEAs and statewide activities, in accordance with paragraph (b)(2) of this section, to carry out effective schools programs under sections 1541-1542 of the Act.

(b) *Limitations*—(1) *State administration.* An SEA may not use more than 25 percent of the chapter 2 funds reserved for State use in any fiscal year for State administration under paragraph (a)(1) of this section.

(2) *Effective schools programs.* (i) Except as provided in paragraph (b)(2)(ii) of ths section, an SEA shall use at least 20 percent of the chapter 2 funds reserved for State use in any fiscal year for effective schools programs under sections 1541-1542 of the Act.

(ii) If a State is spending from non-Federal funds an amount equal to twice the amount required under paragraph (b)(2)(i) of this section, the SEA may request the Secretary to waive the requirement in that paragraph by submitting a written request that includes—

(A) The amount the State is spending from non-Federal funds for effective schools programs; and

(B) A description of those effective schools programs that addresses the factors in section 1542 of the Act.

(Approved by the Office of Management and Budget under control number 1810-0053).

(Authority: 20 U.S.C. 2931, 2941-2942, 2951-2952)

§ 298.14 Use of funds by LEAs.

(a) *General.* An LEA may use chapter 2 funds to support one or more of the targeted assistance programs under § 298.12.

(b) *Special rules.* (1) If an LEA receives additional chapter 2 funds as a result of adjusted allocations under § 298.7(b)(2)(ii), the LEA may, at its discretion, use those funds either—

(i) To provide services to children enrolled in public and private, nonprofit schools in accordance with § 298.34(a)(2); or

(ii) To provide services only to children enrolled in schools—both public and private—in which children described in § 298.7(b)(2)(ii) are enrolled.

(2) If, in any fiscal year, an LEA uses chapter 2 funds under paragraph (b)(1)(ii) of this section, the LEA shall—

(i) Use all funds received as a result of adjusted allocations in that manner; and

(ii) Use in each school with children described in § 298.7(b)(2)(ii) the amount generated by those children who are enrolled in that school.

(3) An LEA is not required to use chapter 2 funds received under § 298.7(b)(2)(ii) to provide services to the children who generated those funds.

(Authority: 20 U.S.C. 2922(c)(2), 2941-2942, 2951-2952)

§ 298.15 Evaluations and reports.

(a) *LEA responsibilities.* (1) An LEA shall—

(i) Report annually to the SEA on the LEA's use of funds under § 298.14; and

(ii) Make that report available to the public.

(2) The LEA shall provide other information to the SEA as reasonably may be required for fiscal audit and program evaluation consistent with the SEA's responsibilities under this part.

(b) *SEA responsibilities.* (1) An SEA shall submit annually to the Secretary data on—

(i) The use of chapter 2 funds by the SEA and LEAs;

(ii) The types of services provided; and

(iii) The children to whom services were provided.

(2) In fiscal year 1992, the SEA shall—

(i) Evaluate the effectiveness of State and local programs conducted under this part;

(ii) Submit the evaluation to the State advisory commitee for review and comment;

(iii) Make the evaluation available to the public; and

(iv) Submit a copy of the evaluation and a summary of the LEA's reports under paragraph (a)(1) of this section to the Secretary.

(3) The SEA shall provide other information to the Secretary as may be required for fiscal audit and program evaluation.

(Approved by the Office of Management and Budget under control number 1810-0053)

(Authority: 20 U.S.C. 2932(a)(6)-(7), 2943(a)(4), 2973)

§§ 298.16—298.20 [Reserved]

Subpart C—Fiscal Requirements That a State or Local Educational Agency Must Meet

§ 298.21 Maintenance of effort.

(a) *Basic standard.* (1) Except as provided in § 298.22, the Secretary pays a State its full allocation of funds under this part if the Secretary finds that either the combined fiscal effort per student or the aggregate expenditures within the State with respect to the provisions of free public education for the preceding fiscal year was not less than 90 percent of the combined fiscal effort per student or of the aggregate expenditures for the second preceding fiscal year.

(2) *Meaning of "preceding fiscal year."* For purposes of determining maintenance of effort, the "preceding fiscal year" is the Federal fiscal year or the twelve-month fiscal period most commonly used in a State for official reporting purposes prior to the beginning of the Federal fiscal year in which funds are available.

Example: For funds first made available on July 1, 1989, if a State is using the Federal fiscal year, the "preceding fiscal year" is fiscal year 1988 (which began on October 1, 1987) and the "second preceding fiscal year" is fiscal year 1987 (which began on October 1, 1986). If a State is using a fiscal year that begins on July 1, 1989, the "preceding fiscal year" is the twelve-month fiscal period ending on June 30, 1988 and the "second preceding fiscal year" is the period ending June 30, 1987.

(3)(i) *Expenditures to be considered.* The expenditures the Secretary considers in determining a State's compliance with the maintenance of effort requirement in this paragraph are State and local expenditures for free public education. These include expenditures for administrative, instruction, attendance, health services, pupil transportation, plant operation and maintenance, fixed charges, and net expenditures to cover deficits for food services and student body activities.

(ii) *Expenditures not to be considered.* The Secretary does not consider the following expenditures in determining a State's compliance with the maintenance of effort requirement in this paragraph:

(A) Any expenditures for community services, capital outlay, or debt service.

(B) Any expenditures of Federal funds.

(b) *Failure to maintain effort.* (1) If a State fails to maintain effort and a waiver under § 298.22 is not appropriate, the Secretary reduces the State's allocation of funds under this part in the exact proportion by which the State fails to meet 90 percent of both the State's combined fiscal effort per student and aggregate expenditures (using the measure most favorable to the State) for the second preceding fiscal year.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year in which the State failed to maintain effort, the Secretary considers the fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the State) for the third preceding fiscal year.

Example. In Federal fiscal year 1990, a State fails to maintain effort because its fiscal effort in the preceding fiscal year (1988) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987). In assessing whether the State maintained effort during the next fiscal year (1991), the Secretary considers the State's expenditures for the second preceding fiscal year (1988) (the year that caused the State's failure to maintain effort) to be no less than 90 percent of the State's expenditures in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2971(a))

§ 298.22 Waiver of the maintenance of effort requirement.

(a) *Waiver request.* A State that has not maintained its fiscal effort as required in § 298.21(a) may ask the Secretary to grant a waiver of that requirement by submitting a waiver request that includes—

(1) A statement of the combined fiscal effort per student and the aggregate expenditures for the two fiscal years being compared; and

(2) A description of the circumstances that the State considers to be exceptional or uncontrollable.

(b) *Secretary's criteria.* (1) The Secretary may grant a waiver, for one year only, of the maintenance of effort requirement in § 298.21(a) if the Secretary determines that the waiver is equitable due to exceptional or uncontrollable circumstances. Exceptional or uncontrollable circumstances include—

(i) A natural disaster;

(ii) A precipitous and unforeseen decline in the financial resources of the State; or

(iii) Other exceptional or uncontrollable circumstances.

(2) The Secretary does not consider tax initiatives or referenda to be ex-

ceptional or uncontrollable circumstances.

(c) *Effect of a waiver.* (1) If the Secretary grants a waiver under paragraph (b) of this section, the Secretary allocates to the affected State its full allocation of chapter 2 funds.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year for which the waiver was granted, the Secretary considers the fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the State) for the third preceding fiscal year.

Example. In Federal fiscal year 1990, a State secures a waiver because its fiscal effort in the preceding fiscal year (1988) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987) due to exceptional or uncontrollable circumstances. In assessing whether the State maintained effort during the next fiscal year (1991), the Secretary considers the State's expenditures for the second preceding fiscal year (1988) (the year for which the State needed a waiver) to be no less than 90 percent of the State's expenditures in the prior fiscal year (1987).

(Approved by the Office of Management and Budget under control number 1810-0653)

(Authority: 20 U.S.C. 2971(a))

§ 298.23 Supplement-not-supplant.

An SEA or LEA that receives chapter 2 funds—

(a) May use and allocate those funds only to supplement and, to the extent practical, increase the level of funds that would, in the absence of Federal funds made available under chapter 2, be made available from non-Federal sources; and

(b) May not use chapter 2 funds to supplant funds from non-Federal sources.

(Authority: 20 U.S.C. 2971(b))

§§ 298.24—298.30 [Reserved]

Subpart D—How Children Enrolled in Private Schools Participate

§ 298.31 Responsibility of SEAs and LEAs.

(a)(1) An LEA shall provide children enrolled in private schools in that LEA with secular, neutral, and nonideological services, materials, and equipment or other benefits that will ensure equitable (as compared to children enrolled in public schools) participation of private school children in the purposes and benefits of chapter 2 in accordance with the requirements in §§ 298.32-298.37 and section 1572 of the Act.

(2) The LEA shall provide the opportunity to participate in a manner that is consistent with the number and needs of private school children in the school district of the LEA.

(3) The LEA shall exercise administrative direction and control over chapter 2 funds and property that benefit children enrolled in private schools.

(4)(i) Provision of services to children enrolled in private schools must be provided by employees of a public agency or through contract by the public agency with a person, association, agency, or corporation that, in the provision of those services, is independent of the private school and of any religious organization.

(ii) This employment or contract must be under the control and supervision of the public agency.

(b)(1) An SEA shall—

(i) Ensure that each LEA complies with the requirements of §§ 298.32-298.37; or

(ii) If no chapter 2 project is carried out by an LEA, make arrangements—such as through contracts with nonprofit agencies or organizations—under which children in private schools in that LEA are provided with services and materials to the extent that would have occurred if the LEA had received chapter 2 funds.

(2) If an SEA conducts instructional programs or personnel training programs, it shall comply with these requirements as if it were an LEA.

(c) Under sections 1522(a)(3)(B) and 1533 (a)(1)(B) of the Act, an application by an SEA or LEA must contain the planned allocation of funds required to implement section 1572.

(d) In accordance with section 1572(a)(1) of the Act, the regulations in this subpart only apply to children enrolled in private, nonprofit elementary and secondary schools.

(Authority: 20 U.S.C. 2972)

§ 298.32 Consultation with private school officials.

In order to receive chapter 2 funds, an LEA shall—

(a) Contact annually appropriate officials from private schools within the area served by the LEA to determine whether those officials desire that their children participate in the chapter 2 program; and

(b) With respect to those officials in schools with children who will participate, consult regarding the development and implementation of the chapter 2 program before the LEA makes any decision that affects the opportunities of private school children to participate in the program.

(Authority: 20 U.S.C. 2922(b)(1), 2972)

§ 298.33 Needs, number of children, and types of services.

An LEA shall determine the following matters on a basis comparable to that used by the LEA in providing for participation of public school children:

(a) The needs of children enrolled in private schools.

(b) The number of those children who will participate in the chapter 2 program.

(c) The chapter 2 services that the LEA will provide to those children.

(Authority: 20 U.S.C. 2972)

§ 298.34 Factors used in determining equitable participation.

(a) *Equal expenditures.* (1) Expenditures for chapter 2 programs for children enrolled in private schools must be equal (consistent with the number of children to be served) to expenditures for chapter 2 programs for children enrolled in the public schools of an LEA, taking into account the needs of the individual children and other factors that relate to such expenditures.

(2) Except as provided in § 298.14(b)(1)(ii), in determining whether expenditures are equal under paragraph (a)(1) of this section, an LEA—

(i) May not take into account the extent to which children in private schools generated a portion of the LEA's allocation under § 298.7(b)(2)(ii); but

(ii) May take into account differences in the costs per child of meeting the needs of the individual children to be served and other factors that relate to these expenditures, as provided in paragraph (a)(1) of this section.

(b) *Services on an equitable basis.* (1) In addition to meeting the equal expenditures requirement in paragraph (a) of this section, an LEA shall provide for the participation in the chapter 2 program of children enrolled in private schools on an equitable basis.

(2)(i) In determining whether an LEA is providing for participation on an equitable basis, the services provided to private school children and the services provided to public school children are considered.

(ii) If an LEA uses chapter 2 funds to concentrate programs for public school children on a particular group, attendance area, or grade or age level, the LEA shall ensure equitable opportunities for participation by children enrolled in private schools who—

(A) Have the same needs as the public school children to be served; and

(B) Are in that group, attendance area, or grade or age level.

(iii) If the needs of children enrolled in private schools are different from the needs of children enrolled in public schools, an LEA shall provide chapter 2 services for the private school children that address their needs on an equitable basis.

(Authority: 20 U.S.C. 2972)

§ 298.35 Funds not to benefit a private school.

(a) An LEA may only use chapter 2 funds to provide services that supplement, and in no case supplant, the level of services that would, in the absence of chapter 2 services, be available to children enrolled in a private school.

(b) An LEA shall use chapter 2 funds to meet the needs of children enrolled in a private school, but not for the purpose of aiding the private school.

(Authority: 20 U.S.C. 2972)

§ 298.36 Equipment and supplies.

(a) To meet the requirements of section 1572(c) of the Act, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the LEA acquires with chapter 2 funds.

(b) The public agency may place equipment and supplies in a private school for the period of time needed for the program.

(c) The public agency shall ensure that the equipment or supplies placed in a private school—

(1) Are used for chapter 2 purposes;

(2) Are used for secular, neutral, and nonideological purposes; and

(3) Can be removed from the private school without remodeling the private school facility.

(d) The public agency shall remove equipment or supplies from a private school if—

(1) The equipment or supplies are no longer needed for chapter 2 purposes; or

(2) Removal is necessary to avoid unauthorized use of the equipment or supplies for other than chapter 2 purposes.

(e) For the purpose of this section, the term "public agency" includes the LEA.

(Authority: 20 U.S.C. 2972)

§ 298.37 Construction.

(a) No chapter 2 funds may be used to perform repairs, minor remodeling or construction of private school facilities.

(b) An LEA may use chapter 2 funds to perform repairs, minor remodeling, or construction of public facilities as may be necessary to carry out its responsibilities under this subpart.

(Authority: 20 U.S.C. 2972)

§ 298.38 Bypass.

(a) The Secretary implements a bypass if an SEA or LEA—

(1) Is prohibited by law from providing chapter 2 services for private school children on an equitable basis; or

(2) Has substantially failed, or is unwilling, to provide services for private school children on an equitable basis.

(b) If the Secretary implements a bypass, the Secretary—

(1) Waives an SEA's or LEA's responsibility for providing chapter 2 services for private school children and arranges to provide the required services;

(2) Consults with appropriate public and private school officials; and

(3) Deducts the cost of these services, including any administrative costs, from the appropriate allotment of chapter 2 funds provided to the State.

(c) Pending the final resolution of an investigation or a complaint that could result in a bypass action, the Secretary may withhold from the allocation of the affected SEA or LEA the amount the Secretary estimates is necessary to pay the cost of the services referred to in paragraph (b) of this section.

(Authority: 20 U.S.C. 2972 (d), (e), (g))

§§ 298.39—298.40 [Reserved]

FINDING AIDS

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Mines, Bureau of	30, VI
National Park Service	36, I
Reclamation Bureau	43, I
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Surface Mining Reclamation and Enforcement, Office of	30, VII
United States Fish and Wildlife Service	50, I, IV
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Agency	CFR Title, Subtitle or Chapter
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International Development, Agency for	22, II
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International Joint Commission, United States and Canada	22, IV
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International Regulatory Agencies (Fishing and Whaling)	50, III
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Federal Contract Compliance Programs, Office of	41, 60
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National Archives and Records Administration	36, XII
National Bureau of Standards	15, II
National Capital Planning Commission	1, IV
National Commission for Employment Policy	1, IV
National Commission on Libraries and Information Science	45, XVII
National Credit Union Administration	12, VII
National Foundation on the Arts and the Humanities	45, XI
National Highway Traffic Safety Administration	23, II, III; 49, V
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National Marine Fisheries Service	50, II, IV
National Mediation Board	29, X
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National Railroad Adjustment Board	29, III
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Rural Telephone Bank	7, XVI
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Saint Lawrence Seaway Development Corporation	33, IV
Science and Technology Policy, Office of	32, XXIV
Science and Technology Policy, Office of, and National Security Council	47, II
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United States Arms Control and Disarmament Agency	22, VI
United States Customs Service	19, I
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United States International Development Cooperation Agency	22, XII
United States International Trade Commission	19, II
United States Postal Service	39, I
United States Soldiers' and Airmen's Home	5, XI
United States Trade Representative, Office of	15, XX
United States Travel Service	15, XII
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Redesignation Table

The Department of Education Organization Act (Pub. L. 96-88) established the Department of Education (ED) as a new executive department.

On May 9, 1980 (45 FR 30802), the following parts were added to Title 34:

(a) Subtitle A consists of Parts 4, 5, 5b, 6, 7, 8, 10, 11, 12, 15, 17, 30, 35, 50, 63, 64, 67, 73, 74, and 79.

(b) Chapter I consists of Parts 100, 101, 104, and 106.

On November 21, 1980 (45 FR 77368), various parts appearing in Title 24, Chapter II, and Title 45, Chapters I, XIII, XIV, and XV, were transferred into Title 34 and redesignated. The following table shows the old part numbers as they appear in Title 24 and 45 and the new part numbers as they appear in Title 34.

45 CFR Old Part Numbers	34 CFR New Part Numbers
Chapter I	
100a	75
100b	76
100c	77
100d	78
101	621
104	400
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105.601-105.607	525
105.611-106.617	526
105.621-105.627	527
111	218
112	219
113	220
114	221
115	222
116	200
116a	201
116b	302
116c	203
116d	204
119	206
120	208
121a	300
121b	305
121c	307
121d	309
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121k	336
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123	500
123a	501
123b	502
123c	503
123d	504
123e	510
123f	514
123g	520
123h	515
123i	505
130	770
131	773
132	776
133	777
134	774
136	775
137	606
146	655
146a	657
147	Removed
148	662
149	660
150	639
151	790
153	Removed
154	644
155	645
157	646
158	216
159	643
160f	745
161	296
161a	298
161b	752
161c	753
161e	755
161f	410
161g	757
161h	758
161i	647
161m	760
162	765
162a	766
162b	767
162c	768
163	440
163a	441

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	674
	675
	676
	682
	686
	695
	648
	270
	631
	740
	769
	280
	250
	251
	252
	253
	254
	255
	256
	257
	258
	259
	260
	261
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	263
	629
	690
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45 CFR Old Part Numbers	34 CFR New Part Numbers
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195	345
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195b	347
196	650
197	240
198	241
199a	605
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1361	361
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1369	369
1370	370
Chapter XIV	
1400	700
1403	701
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1430	703
1440	705
1450	708
1451	710
1460	795
1470	714
1480	716
1490	718
1495	720
Chapter XV	
1501	730

24 CFR Old Part Numbers	34 CFR New Part Numbers
Chapter II	
279	614

TABLE 1—List of CFR Sections Affected Formerly Appearing in Title 34, Government Management

Title 34, Government Management was vacated and existing regulations transferred to Title 5, Part 1310, at 44 FR 60286, Oct. 19, 1979.

All sections in former Title 34 of the Code of Federal Regulations which were affected by documents published in the Federal Register since December 7, 1973, are enumerated in the following list. Entries indicate the nature of changes effected. Page numbers refer to Federal Register pages. The user should consult the entries for chapters and parts as well as sections for revisions.

1973

34 CFR	38 FR Page
Title established	33769
Chapter II	
Chapter established	33769
200 Added	33769
211 Added	34731
231 Added	35464
251 Added	33770
271 Added	34733

1974

34 CFR	39 FR Page
Chapter II	
212 Added	26641
212.4 (c)(5)(ii corrected	27322
(c)(4) and (5) revised	32559
213 Added	32134
232 Added	2606
Appendix B amended	10132
Appendix C amended	10132
Appendix A revised	41250
Appendix B revised	41251
Appendix C revised	41251
233 Added	37367
252 Added	1582
253 Added	797
253.6 Revised	24632
254 Added	1014
255 Added	27133
256 Added	35787
257 Added	42355
281 Added	8615
282 Added	29355

1975

34 CFR	40 FR Page
Chapter II	
232.4 Revised	3290
232.5 Revised	3290
232.8-1 Added	3290
232 Appendix C amended	32329
233 Appendix A amended	30263
234 Added	6780
236 Added	48346
256 Appendix O amended	26031
Appendix M amended (Standard Form 424)	54373
256.4 Revised	51038
256.5 (a) revised	26031
(c) and (d) revised	51038

1976

34 CFR	41 FR Page
Chapter II	
Chapter heading revised	52454
200 (Subchapter A) Removed	52454
211—213 (Subchapter B) Removed	52454
234 Removed	52454
235 Added	755
Heading corrected	54487
236 Removed	52454
251—257 (Subchapter D) Removed	52454

1977

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Chapter established	12

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231 Removed....................................40695

232 Appendix A redesignated and revised as 41 CFR Subpart 101-38.13..............................1477

Removed...56121

233 Redesignated as 41 CFR 101-6.100—101.6.112-1 (Subpart 101-6.1) and revised......... 14097

271 Removed.......................35833, 35853

1978

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235 Removed....................................2722

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281 Redesignated as 41 CFR 101-36.501—101-36.508 (101-36.5) in part..............................27190

282 Redesignated as 41 CFR 101-35.201—101-35.210 (101-35.2) in part..............................27190

1979

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Title vacated and reserved............60286

Chapter I

Chapter removed and redesignated as 5 CFR Part 1310 (Subchapter B)..................................60286

1 Added...37913

TABLE 2—List of CFR Sections Affected Formerly Appearing in Title 45, Public Welfare

At 45 FR 77368, Nov. 21, 1980, various parts appearing in Title 45 Chapters I, XIII, XIV, and XV were transferred into Title 34 and redesignated. All changes in former Chapters I, XIII, XIV, and XV which were made by documents published in the FEDERAL REGISTER from January 1, 1973, through May 29, 1979, are enumerated in the following list. Entries indicate the nature of the changes affected. Page numbers refer to FEDERAL REGISTER pages. The user should consult the entries for chapters and parts as well as sections for revisions.

For the period before January 1, 1973, see the "List of CFR Sections Affected. 1949-1963, and 1964-1972," published in three separate volumes.

1973

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	38 FR Page
Chapter I	
100a Added	30662
100b Added	30679
100c Added	30691
101—190 Subchapter B heading added	30661
111.1 (a), (d), and (e) removed	30658
112.1 (b) and (h) removed	30659
113.1 (b) and (f) removed	30659
114.1 (b), (g), and (v) removed	30659
115.3 (b) and (d) removed	30659
116.1 (e), (j), (k), (m), (t), (u), (x), (y) and (bb) removed	30659
116.21 (a), (b), (c), (d), and (e) removed	30659
116.26 Revised	17127
116.42 Removed	30659
116.46 Removed	30659
116.47 Removed	30659
116.48 Removed	30659
116.53 (a), (b), (c), and (e) removed	30659
116.54 Removed	30659
116.55 Removed	30659
116.56 Removed	30659
116.57 Removed	30659
119.1 (c), (d), (e), (f), (g), (i), (k), and (l) removed	30659
119.7 Removed	30659
119.8 Introductory test revised	30659
119.21 Removed	30659
119.22 (b) removed	30659
119.23 Removed	30659
119.24 Removed	30659
119.25 Removed	30659
119.26 Removed	30659
119.27 Removed	30659

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Chapter I—Continued	38 FR Page
119.28 Removed	30659
119.40—119.52 (Subpart D) Removed	30659
130.2 Removed	30659
130.3 (b), (d), (f), and (g) removed	30659
130.5 (b)(1) through (6) and (8) through (16) removed	30659
130.22 (c) removed	30659
130.31 Removed	30659
130.32 Removed	30659
130.33 Removed	30659
130.34 Removed	30659
130.35 Removed	30659
130.36 Removed	30659
130.37 Removed	30659
130.38 Removed	30659
130.39 Removed	30659
130.40 Removed	30659
130.41 Removed	30659
130.42 Removed	30659
130.43 Removed	30659
130.44 Removed	30659
130.52 Removed	30659
130.53 Removed	30659
130.55 Removed	30659
131.1 Revised	30659
131.2 (e), (f) and (n) removed	30660
131.6 Removed	30660
131.10 Removed	30660
131.12 Removed	30660
131.13 Removed	30660
131.14 Removed	30660
131.15 Removed	30660
131.16 Removed	30660
131.17 Removed	30660
132.1 Revised	30660

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Chapter I—Continued

132.2 (b), (c), (d), and (e) removed 30660
132.5 Removed 30660
132.6 Removed 30660
132.7 Removed 30660
132.8 Removed 30660
132.9 Removed 30660
132.10 Removed 30660
132.11 Removed 30660
132.12 Removed 30660
132.14 Removed 30660
132.16 Removed 30660
132.17 Removed 30660
132.18 Removed 30660
132.19 Removed 30660
132.20 Removed 30660
132.21 Removed 30660
132.22 Removed 30660
132.23 Removed 30660
132.24 Removed 30660
132.25 Removed 30660
132.26 Removed 30660
132.27 Removed 30660
147.2 (e) and (f) removed 30660
150.1 (f) removed 30660
151.2 (b), (d), (h), (j), (k), and (n) removed 30660
151.4 Removed 30660
151.5 (b) removed 30660
151.7 Removed 30660
151.8 Removed 30660
151.9 Removed 30660
151.11 Removed 30660
151.13 Removed 30660
151.14 Removed 30660
151.15 Removed 30660
151.16 Removed 30660
151.18 Removed 30660
151.19 Removed 30660
151.20 Removed 30660
151.21 Removed 30660
151.22 Removed 30660
151.23 Removed 30660
151.31 Removed 30660
151.32 Removed 30660
151.33 Removed 30660
151.34 Removed 30660
151.35 Removed 30660
151.36 Removed 30660
151.37 Removed 30660
151.38 Removed 30660
151.39 Removed 30660
151.40 Removed 30660
151.42 Removed 30660
151.43 Removed 30660
151.44 Removed 30660

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151.46 Removed 30660
151.47 Removed 30660
155.2 (b), (d), and (g) removed 30660
155.3 Removed 30660
155.7 (c) and (f) removed 30660
155.9 (a) removed 30660
155.11 Removed 30660
155.12 Removed 30660
155.13 Removed 30660
155.14 Removed 30660
166 Revised 16133
166.2 Removed 30660
166.3 (f), (g), (h), and (k) removed 30660
166.16 (a) removed 36060
166.21 (a) removed 30660
166.22 Removed 30660
166.23 Removed 30660
166.24 Removed 30660
166.25 Removed 30660
166.26 Removed 30660
166.27 Removed 30660
166.28 Removed 30660
166.29 Removed 30660
166.30 Removed 30660
166.31 Removed 30660
166.33 Removed 30660
166.34 Removed 30660
166.35 Removed 30660
166.36 Removed 30660
166.43 Removed 30660
166.44 Removed 30660
166.46 Removed 30660
166.47 Removed 30660
170 Revised 14096
170.1 (f) and (l) removed 30660
170.2 Removed 30660
170.3 Removed 30660
170.4 Removed 30660
170.5 (b) removed 30660
170.6 (b)(1) and (2) and (c) removed 30660
170.8 Removed 30660
170.13 (a)(4) removed 30660
170.14 (b) amended 30660
170.18 (a) and (c) removed 30660
170.19 Removed 30660
170.45 Removed 30660
173.1 (b), (d), (e), (g), and (i) removed 30660
173.14 Revised 30660
173.16 Removed 30660
173.23 Removed 30660
173.24 Removed 30660
173.25 Removed 30660

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173.26 Removed..............................30660
173.27 Removed..............................30660
173.28 Removed..............................30660
173.29 Removed..............................30660
173.30 Removed..............................30660
173.31 Removed..............................30660
173.32 Removed..............................30660
173.33 Removed..............................30660
173.37 Removed..............................30660
175.2 (d), (h), and (s) removed.... 30660
175.15 Removed..............................30660
175.16 (b) and (c) removed...........30660
175.17 Removed..............................30660
176 Added.......................................15930
177.1 (d) and (i) removed............ 30661
177.2 Revised.. 25
177.4 (c)(3)(xiv) added.....................1509
(c)(3)(xv) added..............................9669
(c)(3)(xvi) added...........................20072
(c)(3)(xvii) added......................... 27935
177.10 Added..25
178.1 (d) and (i) removed............ 30661
180 Revised.................................... 16065
180.02 (a), (h), and (k) removed.. 30661
180.03 Removed............................30661
180.04 Removed............................30661
180.05 Removed............................30661
180.06 Removed............................30661
185 Added..3452
185.02 (b), (c), (h), (l), and (m) removed..30661
185.03 Revised............................. 30661
185.31—185.38 (Subpart D) Added... 10094
185.44 (d)(3) revised......................21646
185.51—185.56 (Subpart F) Added... 10098
185.71—185.76 (Subpart H) Added... 10101
185.81—185.85 (Subpart I) Added... 10103
185.91—185.94 (Subpart J) Added... 10104
185.95 (b)(1) and (3) revised...13563, 21647
85 Appendix A removed............30661
86 Added...18018
86.2 Amended.......................... 30661
86.31—186.34 (Subpart D) Removed.. 30661
87 Added...19826
87.2 Amended............................ 30661
87.3 Added...30661

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187.21 Introductory text revised; (e), (f), (g), (h), (i), and (j) removed............................... 30661
187.31—187.34 (Subpart D) Removed.. 30661
189 Added..27825
190.31—190.39 (Subpart C) Added... 15419
190.41—190.48 (Subpart D) Added... 15421

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1501 Added......................................13486

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100a.10 (a) (22) and (24) removed.. 19212
100a.400 Revised.......................... 19212
100b.10 (l) added.......................... 19213
101.10—101.13 (Subpart B) Added.. 19212
130 Revised....................................... 41711
131 Revised....................................... 40495
132 Revised....................................... 17540
133 Added...17546
149 Added...30042
151 Revised....................................... 22147
154 Added...14945
155.7 Revised................................ 19216
158 Revised....................................... 22343
166.11 (a) revised...........................18074
166.44 Removed...........................17104
169 Added...18650
170 Revised....................................... 26724
170.6 (b)(1) and (2) and (c) removed.. 17104
170.8 Removed..............................17104
174 Added...10567
175.3a Revised.............................. 17547
175.14a Added...............................37385
176 Revised....................................... 37385
176.1 Corrected............................. 37987
176.4 (b) amended......................... 37987
176.16 (c) corrected........................37987
176.20 (e)(3) corrected..................37987
176.21 (a) corrected........................37987
177.4 (c)(3)(xviii) added.................. 1849
(c)(3)(xix) added.......................... 17104
(c)(3)(xx) added........................... 25943
(c)(3)(xxi) added.......................... 36967
180.13 (a) revised..........................16886

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